# THE GENERAL STATUTES OF NORTH CAROLINA

## 1977 CUMULATIVE SUPPLEMENT

**Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers**

UNDER THE DIRECTION OF

W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

## Volume 1A

### 1975 Replacement

Annotated through 292 N.C. 643 and 33 N.C. App. 240. For complete scope of annotations, see scope of volume page.

**Place in Pocket of Corresponding Volume of Main Set.**
**This Supersedes Previous Supplement, Which**
**May Be Retained for Reference Purposes.**

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# Preface

This Cumulative Supplement to Replacement Volume 1A contains the general laws of a permanent nature enacted at the 1971, the First and Second 1973, the First and Second 1975 and the 1977 Sessions of the General Assembly which are within the scope of such volume, and brings to date the annotations included therein. At the First 1973 Session, the General Assembly enacted Session Laws 1973, Chapters 1 to 826. At the Second 1973 Session, which was held in 1974, the General Assembly enacted Session Laws 1973, Chapters 827 to 1482.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

# Scope of Volume

**Statutes:**

Permanent portions of the general laws enacted at the 1971, the First and Second 1973, the First and Second 1975 and the 1977 Sessions of the General Assembly affecting Chapters 1 through 1B of the General Statutes.

**Annotations:**

Sources of the annotations:
North Carolina Reports volumes 275 (p. 342)-292 (p. 643).
North Carolina Court of Appeals Reports volumes 5 (p. 228)-33 (p. 240).
Federal Reporter 2nd Series volumes 410 (p. 449)-554 (p. 1074).
Federal Supplement volumes 298 (p. 1201)-431 (p. 434).
Federal Rules Decisions volumes 56 (p. 663)-74 (p. 213).
United States Reports volumes 394 (p. 576)-419 (p. 984).
Supreme Court Reporter volumes 89 (p. 2152)-97 (p. 2204).
North Carolina Law Review volumes 47 (p. 732)-49 (p. 1006), volume 55 (pp. 1-750).
Wake Forest Intramural Law Review volumes 6-13 (p. 269).
Duke Law Journal volumes 3 (p. 485)-6 (p. 1395).
North Carolina Central Law Journal volume 2 (pp. 1-164), volume 3 (pp. 123-268), volume 7 (pp. 201-413), volume 8 (pp. 1-122).
Opinions of the Attorney General.

# The General Statutes of North Carolina
# 1977 Cumulative Supplement

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# SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

## ARTICLE 1.

## *Definitions.*

### § 1-1. Remedies.

**References to Superior Court Deemed to Refer Also to District Court.** — Following the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the superior court are deemed to refer also to the district court. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

**§ 1-7. When court means clerk.** — In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session of the court, in which cases the judge of the court alone is meant. (C. C. P., s. 9; Code, s. 132; Rev., s. 352; C. S., s. 397; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

## ARTICLE 2.

## *General Provisions.*

### § 1-11. How party may appear.

**Editor's Note.** — For note on the right to defend pro se, see 48 N.C.L. Rev. 678 (1970).

**Effect of Appearance Pro Se on Admission of Evidence, Etc.** — Where defendant appeared pro se, the trial court did not err in allowing the admission of evidence to which defendant offered no objection at the time of its admission and in failing to warn the defendant of his right against self-incrimination when the defendant offered to testify in his own behalf. State v. Lashley, 21 N.C. App. 83, 203 S.E.2d 71 (1974).

**§ 1-13. Jurisdiction of clerk.** — The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular session is expressly referred to. (C. C. P., s. 108; Code, s. 251; Rev., s. 358; C. S., s. 403; 1971, c. 381, s. 12.)

**Editor's Note.** —

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

## SUBCHAPTER II. LIMITATIONS.

## ARTICLE 3.

## *Limitations, General Provisions.*

**§ 1-15. Statute runs from accrual of action.** — (a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action. (C. C. P., s. 17; Code, s. 138; Rev., s. 360; C. S., s. 405; 1967, c. 954, s. 3; 1971, c. 1157, s. 1; 1975, 2nd Sess., c. 977, ss. 1, 2.)

**Editor's Note. —**

The 1971 amendment redesignated the former section as subsection (a), and added subsection (b).

Session Laws 1971, c. 1157, s 2, provides: "This act shall become effective upon ratification and shall not affect pending litigation."

The 1975, 2nd Sess., amendment, effective Jan. 1, 1977, inserted "or one for malpractice arising out of the performance of or failure to perform professional services" near the beginning of subsection (b) and added subsection (c).

Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause. Session Laws 1977, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

For note on when a cause of action accrues for limitations purposes in medical malpractice—the discovery rule, see 6 Wake Forest Intra. L. Rev. 532 (1970).

For note discussing the 1971 act adding subsection (b) which adopted the "discovery rule" for determining when a cause of action accrues, see 7 Wake Forest L. Rev. 688 (1971).

**The purpose of a statute of limitations** is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Statutes of limitations are inflexible and unyielding.** They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**The court has no discretion when considering whether a claim is barred** by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**This section did not affect litigation pending when it was ratified.** Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

**Right of Defendant to Rely on Statute as a Defense.** — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Burden of Proof on Plaintiff When Statute Pleaded.** — The statute of limitations having been pleaded, the burden is on the plaintiff to show that his cause of action against the defendant accrued within three years prior to the institution of the suit. State v. Cessna Aircraft Corp., 9 N.C. App. 557, 176 S.E.2d 796 (1970).

**In general a cause of action accrues, etc. —** The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975); Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

A cause of action accrues, in general, and starts the statute of limitations, as soon as the right to bring suit arises. North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

The cause of action ordinarily accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

**Cause of Action for Negligent Injury Ordinarily Accrues When Wrong Committed.** —

In accord with original. See Ford Motor Credit Co. v. Minges, 473 F.2d 918 (4th Cir. 1973).

**A suit does not involve an "injury to the person or rights of another" until plaintiff is hurt.** Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969).

**Purpose of Subsection (b).** — The purpose of subsection (b) was to give relief to injured persons from the harsh results flowing from previous law by enlarging, not restricting, the time within which an action for damages could be brought. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

**Applicability of Subsection (b).** — The 1971 amendment adding subsection (b) is remedial in nature, and absent a clear manifestation of legislative intent that it apply prospectively only, it is applicable to claims in existence and not yet barred when the statute became effective, the sole exception being that the statute "shall not affect pending litigation." Although an action already barred may not be revived by the legislature, that body may extend at will the time for bringing actions not already barred by an existing statute. Shuler v. Gaston County Dyeing Mach. Co., 30 N.C. App. 577, 227 S.E.2d 634, cert. denied, 291 N.C. 177, 229 S.E.2d 690 (1976).

The provisions of subsection (b) come into play where there is a latent injury. Pinkston v. Baldwin, Lima, Hamilton Co., 292 N.C. 260, 232 S.E.2d 431 (1977).

**Action for Injuries Resulting from Accident Caused by Defective Tire.** — Where plaintiff brought action for injuries suffered in an accident allegedly caused by failure of a tire, it was held that there was no "injury" and no basis for action and the statute did not begin to run until the wreck occurred. Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969). See subsection (b) of this section, added by the 1971 amendment.

**Action for Damages Caused by Negligent Manufacture, etc., of Heating and Cooling System.** — A cause of action to recover damages for the destruction of plaintiffs' home by fire allegedly caused by the negligent manufacture and installation of a heating and cooling system in the home accrued and the statute of limitations began to run on the day the delivery of the defective equipment was completed. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973), wherein action was instituted before the effective date of subsection (b) of this section.

**Injury to Buyer of Defective Lawn Mower.** — Where a buyer purchased a lawn mower allegedly defective in design as well as in manufacture, the statute of limitations commenced to run on the date of the sale of the lawn mower to the buyer, and not on the date on which his eye was injured. Green v. M.T.D. Prod., Inc., 449 F.2d 757 (4th Cir. 1971), decided prior to the 1971 amendment to this section.

**Effect of Subsection (b) on Prior Case Law.** — The 1971 amendment adding subsection (b), in essence, overruled all of the prior case law which had held that a cause of action for defective manufacture accrued at the time of sale. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975).

Subsection (b) supersedes the common-law rule that a claim arises, and the statute of limitations begins to run, as soon as the injured party's rights are violated. North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

**Subsection (b) Not Intended To Affect Accrual of Wrongful Death Action.** — The legislature indicated by its excepting phrase in § 1-15(b) that it did not wish by that subsection to permit an action for wrongful death, whether one arising out of a product defect or otherwise, to be begun more than two years after death; it intended that § 1-53(4) should continue to control the accrual date of actions for wrongful death and the time when the statute of limitations should begin to run. Arrowood v. GMC, 539 F.2d 1321 (4th Cir. 1976).

Although the legislature apparently intended to extend the statute of limitations in the case of an individual who is injured because of a negligently manufactured product, it for some unexplained reason did not intend to extend this same right to his administrator if he is killed instead of injured. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975).

**But It Does Affect Condition to Maintenance of Wrongful Death Action When Barred on Defective Product.** — Subsection (b) removed the requirement that an action for personal injuries arising out of a product defect must be brought within three years after purchase of the product and it removed it not only for any suit for personal injuries not barred on the ratification of subsection (b) (i.e., July 21, 1971), but for the hypothetical one stated in former § 28-173 by way of a condition to the maintenance of an action for wrongful death. Arrowood v. GMC, 539 F.2d 1321 (4th Cir. 1976). Section 28-173 was repealed with the rest of former Chapter 28 by Session Laws 1973, c. 1329. For a present similar provision see § 28A-18-2.

**Subsection (b) does not extend the statute of limitations in contract actions** since a hidden bodily injury, or defect or damage to property might be material in an action for breach of contract, but would not be an "essential element." Nort Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

**Purpose of Proviso in Subsection (b).** — To prevent subsection (b) from subjecting tort-feasors to suit for alleged acts or defaults so far in the past that evidence as to the event would be difficult to secure and intervening causes would be likely, though difficult to prove, the legislature added the proviso. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

**Liability of manufacturer in wrongful death case is not limited to 10 years.** Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975).

**Applied** in Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

**Quoted** in Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

**Cited** in Bradley v. Lewis Motors, Inc., 12 N.C. App. 685, 184 S.E.2d 397 (1971); Employers Commercial Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972); Raftery v. Wm. C. Vick Constr. Co., 29 N.C. App. 495, 224 S.E.2d 706 (1976).

**§ 1-17. Disabilities.** — (a) A person entitled to commence an action who is at the time the cause of action accrued either

(1) Within the age of 18 years; or

(2) Insane;

may bring his action within the time herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

(b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c): Provided, that if said time limitations expire before such minor attains the full age of 19 years, the action may be brought before said minor attains the full age of 19 years. (C. C. P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C. S., s. 407; 1971, c. 1231, s. 1; 1975, c. 252, ss. 1, 3; 1975, 2nd Sess., c. 977, s. 3.)

**Cross Reference.** — As to effect of lowering age of majority from 21 to 18 upon applicability of statute of limitations tolled for infancy, see § 48A-3.

**Editor's Note.** —

The 1971 amendment substituted "18" for "twenty-one" in subdivision (1) of subsection (a).

The 1975 amendment, effective Jan. 1, 1976, repealed former subdivision (3) of the first paragraph of subsection (a), which made imprisonment on a criminal charge a disability, substituted "time" for "times" preceding "herein limited" in the first paragraph of subsection (a), and added the second paragraph of subsection (a).

The 1975, 2nd Sess., amendment effective Jan. 1, 1977, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause. Session Laws 1977, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Once the period of limitation begins to run,** the subsequent accession of a minor to a right of action cannot toll its running. Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

**Cited** in Hanes Dye & Finishing Co. v. Caisson Corp., 309 F. Supp. 237 (M.D.N.C. 1970); Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

## § 1-21. Defendant out of State; when action begun or judgment enforced.

**Editor's Note. —**

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For comment discussing the conflict of § 1-75.4 with this section, see 12 Wake Forest L. Rev. 1041 (1976).

**The general purpose, etc. —**

One of the purposes of this section is to prevent defendants from having the benefit of the lapse of time — the statute of limitations — while they remain beyond the limits of the State and allow their debts to remain unpaid, it not being the policy of the State to drive its citizens to seek their legal remedies abroad. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

**When a nonresident defendant is amendable to process there is no need for a tolling statute.** Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

The application of a tolling statute such as this section when defendant has at all times been subject to the service of process under § 1-75.4(5) by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

That there is little need to give effect to a tolling statute when a nonresident is amendable to service that will confer personal jurisdiction does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

**Sections 1-105 and 1-105.1 Not in Conflict with Section. —** Sections 1-105 and 1-105.1, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal this section, even though there is no need for a tolling statute when a nonresident defendant is amendable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243 (1976).

**Cited** in Miller v. Perry, 456 F.2d 63 (4th Cir. 1972).

**§ 1-22. Death before limitation expires; action by or against personal representative or collector.** — If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representative or collector after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3. If the claim upon which the cause of action is based is filed with the personal representative or collector within the time above specified, and its validity is admitted in writing by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative or collector upon such claim after his final settlement. (C.C.P., s. 43; 1881, c. 80; Code, s. 164; Rev., s. 367; C.S., s. 412; 1977, c. 446, s. 2.)

### I. GENERAL CONSIDERATION.

**Editor's Note. —**

The 1977 amendment, effective Sept. 1, 1977, substituted "personal representative or collector" for "representatives" in the first sentence, inserted "or collector" and substituted the proviso for "and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person" at the end of the second sentence, and inserted "or collector" in two places and substituted "its validity is admitted in writing by him" for "admitted by him" in the third sentence.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

**This section makes a distinction between claims in favor of a decedent's estate and claims against a decedent's estate.** The former must be brought within one year of death, while the latter, within one year of letters testamentary or administration. Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**The reason for this distinction** is that the time during which there was no administration upon the estate of the claimant should be counted because the law does not encourage remissness in those entitled to administration. Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**Applicability in Wrongful Death Actions.** — This section is of no avail to a plaintiff in a wrongful death action where she does not qualify and file suit within that time limit. Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 205 S.E.2d 353 (1974).

### II. DEATH OF CREDITOR.

**Construction upon Section.** —

In accord with 2nd paragraph in original. See Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

### III. DEATH OF THE DEBTOR.

**A county's general claim against the estate of a recipient of old age assistance** to recover for such assistance is governed by this section. Mecklenburg County v. Lee, 18 N.C. App. 239, 196 S.E.2d 814 (1973).

## § 1-26. New promise must be in writing.

### I. GENERAL CONSIDERATION.

**Cited** in Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

### II. ACKNOWLEDGMENT OR NEW PROMISE.

**Statute Not Tolled Absent Writing.** — The running of the statute of limitations is not tolled by the promise of defendant to pay, where there is neither allegation nor evidence of any writing required by this section to repel the bar of the statute of limitations in an action on a contract. Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

**Action Based on Failure of Equipment to Conform to Original Warranty.** — The statute providing that a new promise must be in writing and signed by the party to be charged in order to start the running of the statute of limitations, is inapplicable where the plaintiff's action was based upon the failure of the equipment to conform with the original warranty and not upon any new promise by the seller. Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969).

## § 1-30. Applicable to actions by State.

**Statutes of Limitations Are Not Applicable against the State in Escheats.** — See opinion of Attorney General to Mr. Edwin Gill, State Treasurer, 42 N.C.A.G. 49 (1972).

## § 1-31. Action upon a mutual, open and current account.

**Mutual Account.** — A mutual account is a course of dealing where each party furnishes credit to the other on the reliance that, upon settlement, the amounts will be allowed so that one will reduce the balance due the other. Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

**Open Account.** — An open account results where the parties intend that the individual items of the account shall not be considered independently, but as a connected series of transactions. Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

**Current Account.** — A current account is one with no time limitation fixed by agreement, express or implied. Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

**Accounts to Which Applicable — Running Account, etc.** —

An ordinary store account or any other account (though open and continued) where the credit is all on one side and the payments on account are on the other is not a mutual, open and current account under this section. Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

## ARTICLE 4.

## *Limitations, Real Property.*

### § 1-35. Title against State.

**Applied** in State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976).

### § 1-36. Title presumed out of State.

**This section makes it unnecessary to prove the sovereign has parted with its title when not a party to the action.** King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

**When Title Out of State Presumed.** — In a condemnation proceeding, where the question of ownership was essentially an action between individual litigants, and the State, although a party for purposes of condemnation, claimed title only by virtue of the condemnation and not otherwise, the presumption is that title is out of the State. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

**No Presumption in Favor of One Party or the Other.** —

In accord with original. See Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

**Cited** in Lachmann v. Baumann, 22 N.C. App. 160, 205 S.E.2d 805 (1974).

**§ 1-38. Seven years' possession under color of title.** — (a) When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title.

(b) If

(1) The marking of boundaries on the property by distinctive markings on trees or by the implacement of visible metal or concrete boundary markers in the boundary lines surrounding the property, such markings to be visible to a height of 18 inches above the ground, and

(2) The recording of a map prepared from an actual survey by a surveyor registered under the laws of North Carolina, in the book of maps in the office of the register of deeds in the county where the real property is located, with a certificate attached to said map by which the surveyor certifies that the boundaries as shown by the map are those described in the deed or other title instrument or proceeding from which the survey was made, the surveyor's certificate reciting the book and page or file number of the deed, other title instrument or proceeding from which the survey was made,

then the listing and paying of taxes on the real property marked and for which a survey and map have been certified and recorded as provided in subdivisions (1) and (2) above shall constitute prima facie evidence of possession of real property under known and visible lines and boundaries. Maps recorded prior to October 1, 1973 may be qualified under this statute by the recording of certificates prepared in accordance with subdivision (b)(2) above. Such certificates must contain the book and page number where the map is filed, in addition to the information required by subdivision (b)(2) above, and shall be recorded and indexed in the deed books. When a certificate is filed to qualify such a recorded map, the register of deeds shall make a marginal notation on the map in the following form: "Certificate filed pursuant to G.S. 1-38(b), book ...... (enter book where filed), page ......."

(c) Maps recorded prior to October 1, 1973 shall qualify as if they had been certified as herein provided if said maps can be proven to conform to the boundary lines on the ground and to conform to instruments of record conveying the land which is the subject matter of the map, to the person whose name is indicated on said recorded map as the owner thereof. Maps recorded after October 1, 1973 shall comply with the provisions for a certificate as hereinbefore set forth. (C. C. P., s. 20; Code, s. 141; Rev., s. 382; C. S., s. 428; 1963, c. 1132; 1973, c. 250; 1975, c. 207.)

## I. GENERAL NOTE ON ADVERSE POSSESSION.

### A. General Consideration.

**Editor's Note. —**

The 1973 amendment, effective Oct. 1, 1973, designated the former provisions of this section as subsection (a) and added subsections (b) and (c).

The 1975 amendment deleted, at the end of the first sentence of subsection (b), a proviso to the effect that "certificates in accordance with the foregoing may be affixed to maps presently recorded and thus comply with this statute," and added the second, third and fourth sentences of subsection (b).

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Definition. —**

In accord with 1st paragraph in original. See Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Wilson County Bd. of Educ. v. Lamm, 276 N.C. 487, 173 S.E.2d 281 (1970); Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

**There must be known and visible boundaries, etc. —**

A party claiming under adverse possession must show possession under known and visible boundaries. Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

**Color of title, etc. —**

Where a will is defectively probated, but the defect in the probate is not so obvious that it might mislead a man of ordinary capacity, it is color of title for the land disposed of therein. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

**Effect of Holding Portion of Land, etc. —**

When one enters upon a tract of land and asserts his ownership of the whole under an instrument which constitutes color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed—provided no part of the premises is held adversely by another. His exclusive possession, if continued uninterruptedly for seven years, will ripen title to all the land embraced within the deed. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Where the title deeds of two rival claimants lap, etc. —**

In accord with 1st paragraph in original. See Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

When a portion of a boundary of a junior grant laps on a superior title to mature a title under the junior grant, there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

When a junior grant incorporates a portion of a senior grant it is not necessary for the junior grantee claiming title by seven years' adverse possession under color to show that the boundaries of the lappage where visible on the ground, although the claimant must establish the required adverse possession within those lines. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Claim under Void Devise Is Not Adverse. —**

Where one enters into possession of lands claiming as a devisee under a will, and the devise is void, he does not claim adversely but rather permissively or mistakenly. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

### B. Character of Possession.

**Possession Must Be Actual, etc. —**

In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

In an action to quiet title to realty, a plaintiff may acquire title to the disputed property by adverse possession only if the jury is satisfied that the acts of ownership described by the witnesses constitute open, notorious and adverse possession. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

**The possession of one tenant in common, etc. —**

The possession of one tenant in common is presumed to be the possession of all tenants. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

**Possession by Parent against Child.** — In order that a possession by a parent against a child, or vice versa, may become adverse, the owner must have had some clear, definite, and unequivocal notice of the adverse claimant's intention to assert an exclusive ownership in himself. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

**Continuity and Duration. —**

To claim adverse possession, there must be a continuous possession of public notoriety. Occasional entries upon the land will not serve, for they may either be not observed, or if observed, may not be considered as the assertion of rights. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Whereas the occupation and use by the adverse claimant must be continuous, it need not be unceasing. Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

**Adverse possession is denoted by the exercise of acts of dominion** over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Cutting Timber or Pulpwood.** — When cutting timber or pulpwood is relied upon to show adverse possession it must be kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Giving permission to hunt,** like the payment of taxes, is evidence of an adverse claim, but is not possession. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

## II. NOTE TO SECTION 1-38.

**Color of Title Defined. —**

Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969), Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Color of title is that which gives the semblance or appearance of title, but is not title in fact — that which, on its face, professes to pass title, but fails to do so because of a want of title in the person from whom it comes or the employment of an ineffective means of conveyance. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

If an instrument actually passes the title, it is clear that it is not color of title. The term implies that a valid title has not passed. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**A deed is color of title, but color of title is not sufficient to make a prima facie case of title.** King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

**The color of title must be strengthened by possession,** which must be open, notorious, and adverse for a period of seven years. King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

**Nothing Must Be Left to Conjecture.** — In proving title by continuous, open and adverse possession of land under color of title for seven years, nothing must be left to conjecture. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Sufficiency of Paper to Constitute Color — Valid Deed. —**

A valid deed — a muniment of title — may also serve as color of title. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**Same — Deed Describing Contiguous Land Not Owned by Vendor.** — When the description in a deed embraces not only land owned by the grantor but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Character of Possession, etc. —**

Regardless of whether his claim is under color of title for seven years or under claim of right, without color of title, for 20 years, the claimant must show his possession to have been actual, open, visible, notorious, continuous and hostile to the true owner's title and to all persons for the full statutory period. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

**Possession of Vendee of Part of Tract Does Not Inure to Benefit of Vendor.** — Where the purchase is of part of a tract of land, the vendee's possession will not inure to the benefit of the vendor as to the remainder of the tract for the purpose of showing possession of the tract by the vendor. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

**Landowner with Good Title Cannot Ignore Duly Recorded Easement.** — When it is shown that the landowner has a good title based on a connected chain of title to a common source, such landowner will not be permitted to ignore a duly recorded easement granted by his predecessors in title by the fiction of treating his valid deed merely as color of title and thereby defeat an outstanding valid easement by adverse possession for a period of seven years. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**Applied** in Lachmann v. Baumann, 22 N.C. App. 160, 205 S.E.2d 805 (1974).

**Cited** in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

## § 1-39. Seizing within twenty years necessary.

**Same — Section Construed with § 1-42.** — This section and § 1-42 are to be construed together. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

**Deed as Evidence of Possession.** — The offer of a deed dated in 1935, together with evidence identifying the land described therein, constituted prima facie evidence of plaintiff's possession of the described lands within the time required by law to maintain an action for the recovery or possession of real property. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

**Stipulation that Plaintiff Possessed Premises Does Not Concede that Plaintiff Has Good Title.** — A defendant may stipulate that a plaintiff is entitled to prosecute his action to recover realty because he has been possessed of the premises in question within 20 years before the commencement of the action without conceding that the plaintiff has good title to the property or is presently entitled to possession. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

**Cited** in McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971); Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

## § 1-40. Twenty years adverse possession.

**Editor's Note.** —

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970). For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Character of Possession.** — In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

In an action to quiet title to realty, a plaintiff may acquire title to the disputed property by adverse possession only if the jury is satisfied that the acts of ownership described by the witnesses constitute open, notorious and adverse possession. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

In order to establish title by adverse possession there must be actual possession with an intent to hold solely for the possessor to the exclusion of others. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

The claimant must exercise acts of dominion over the land in making the ordinary use and taking the ordinary profits of which the land is susceptible, with such acts being so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

There must be an actual possession of the real property claimed; the possession must be hostile to the true owner; the claimant's possession must be exclusive; the possession must be open and notorious; the possession must be continuous and uninterrupted for the statutory period; and the possession must be with an intent to claim title to the land occupied. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible. The test is involved in the question whether the acts of ownership were such as to subject the claimants continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausam fregit for damages. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

**Entry into Possession with Permission of Owner.** — If a person enters into possession of a piece of land with the permission of the owner, such possession would not be adverse unless and until the plaintiff disclaimed such arrangement and made the owner aware of such disclaimer or disclaimed the arrangement in such manner as to put the owner on notice that the person was no longer using the land by permission but was claiming it as absolute owner. Wilson County

Bd. of Educ. v. Lamm, 276 N.C. 487, 173 S.E.2d 281 (1970).

**Purchase of Adverse Claim.** — A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. Wilson County Bd. of Educ. v. Lamm, 276 N.C. 487, 173 S.E.2d 281 (1970).

**Absence Due to Imprisonment.** — See Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

**Cited** in Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

## § 1-42. Possession follows legal title; severance of surface and subsurface rights.

**Editor's Note.** —

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Deed as Evidence of Possession.** — The offer of a deed dated in 1935, together with evidence identifying the land described therein, constituted prima facie evidence of plaintiff's possession of the described lands within the time required by law to maintain an action for the recovery or possession of real property. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

**Construed with § 1-39.** —

This section and § 1-39 are to be construed together. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

This section, when construed with § 1-39, simply means that proof of a connected chain of title to real estate for a period of 30 years by a party seeking possession thereof is prima facie evidence that such party has been in possession of the real estate within 20 years next preceding the institution of the action, as required by § 1-39, and thus has standing to maintain his action. It does not mean that a party may meet the burden of proving title simply by basing his claim on an instrument recorded at least 30 years before the institution of his action. That burden must still be met. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

**Burden and Sufficiency of Proof.** —

When both parties claim title to land, and each seeks an adjudication that he is the owner and entitled to possession of the disputed property, each has the burden of establishing his title. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

## § 1-42.1. Certain ancient mineral claims extinguished.

**Editor's Note.** —

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**§ 1-42.2. Certain additional ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.** — (a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1971, any person, having the legal capacity to own land in this State, who has on September 1, 1971 an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 but not more than 56 years prior to September 1, 1971, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1971, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1971, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.2(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1971.

The provisions of this subsection shall apply to the following counties: Rowan, Anson, Buncombe, Catawba, Davidson, Durham, Franklin, Guilford, Haywood, Hoke, Iredell, Jackson, Madison, Montgomery, Moore, Person, Richmond, Robeson, Scotland, Swain, Transylvania, Union, Wake, Warren and Yancey. (1971, c. 235, s. 1; c. 855.)

**Editor's Note.** — Session Laws 1971, c. 235, s. 2, makes the act effective Sept. 1, 1971.

The 1971 amendment, effective Sept. 1, 1971, added subsection (d).

**§ 1-42.3. Additional ancient mineral claims extinguished in certain counties; oil, gas and mineral interests to be recorded and listed for taxation in such counties.** — (a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1974, any person having the legal capacity to own land in this State, who has on September 1, 1974, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interest in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1974, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1974, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1974, all oil, gas or mineral interest in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.3(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interest shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1974.

The provisions of this subsection shall apply to the following counties: Alleghany, Avery, Burke, Caldwell, Cherokee, Clay, Cleveland, Gaston, Gates, Graham, Halifax, Henderson, Macon, McDowell, Mitchell, Polk, Randolph, Stanly, Surry, Watauga, and Wilkes. (1973, c. 1435.)

**§ 1-42.4. Additional ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.** — (a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interest in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interest has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1977, any person having the legal capacity to own land in this State, who has on September 1, 1977, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1977, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1977, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1977, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interests must be filed in writing in the manner provided by G.S. 1-42.4(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1977. The provisions of this subsection shall apply to the following county: Ashe. (1977, c. 751.)

**Editor's Note.** — The title of the act which added this section restricted its application to Ashe County.

### § 1-45. No title by possession of public ways.

**Acquisition Acquisition of Right Superior to Others Except State Not Prevented.** — While this section prevents a person from acquiring an exclusive right to land, it does not prevent a person from acquiring a right superior to that of all other persons save the State. Saddle Club, Inc. v. Gibson, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

**A stipulation that certain land is within a right-of-way of the Highway Department** indicates only that the State has a superior right, if it chooses to exercise it, to the land. Saddle Club, Inc. v. Gibson, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

**Does Not Preclude Person from Acquiring Lawful Possession.** — The rights of the State do not preclude a person from acquiring actual, lawful possession, if the evidence is sufficient to support a finding of fact to that effect. Saddle Club, Inc. v. Gibson, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

## ARTICLE 5.

## *Limitations, Other than Real Property.*

### § 1-46. Periods prescribed.

**The purpose of a statute of limitations** is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Statutes of limitations are inflexible and unyielding.** They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**The court has no discretion when considering whether a claim is barred** by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Right of Defendant to Rely on Statute as a Defense.** — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Applied** in Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

**Cited** in Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

## § 1-47. Ten years.

### I. IN GENERAL.

**Statutes of Limitation Characterized.** — Statutes of limitation may be characterized as a right not to be sued beyond the time limited. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

**Cited** in North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

### IV. SUBDIVISION (2). SEALED INSTRUMENTS.

**Effect of Assignment of Right Not to Be Sued after 10 Years.** — Where the assignor had a right not to be sued after 10 years from the accrual of a cause of action under the sealed contract it entered into with plaintiff, by assigning this contract, the assignor could not confer upon defendant assignee a greater immunity to suit than the assignor itself possessed. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

When defendant impliedly assumed its assignor's contractual obligations under the general assignment of a contract under seal, it exposed itself for ten years to suit on the sealed contract. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

**Counterclaim under Truth-in-Lending Act.** — In an action to recover under an installment sales contract, subdivision (2) of this section cannot be utilized to allow a counterclaim under the Federal Truth-in-Lending Act, 15 U.S.C. 1601, after the one-year limitation on actions under 15 U.S.C. 1640(e) has expired, since it is inconsistent with the new amendment to the federal act, 15 U.S.C. 1681. Ken-Lu Enterprises, Inc. v. Neal, 29 N.C. App. 78, 223 S.E.2d 831, 290 N.C. 308, 225 S.E.2d 829 (1976).

## § 1-50. Six years.

### I. IN GENERAL.

**Subdivision (5) Not Applicable Where Property Not Part of Realty.** — In an action by an insurer for damages for defendant's alleged breach of warranty and negligent failure to repair properly a furnace transformer, where the transformer was not part of the realty at any time defendant was repairing it, but the insured severed and removed it from its plant, and sent it to defendant's plant by railroad flatcar for repair, subdivision (5) clearly was not applicable. Employers Com. Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972).

**Or to Homeowners in Actual Possession and Control of Premises.** — Subdivision (5) does not apply to homeowners in actual possession and control of the premises. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973).

The legislature intended, in subdivision (5) of this section, to benefit only those persons who were not in possession and control of the real property at the time the defective or unsafe condition of such improvement constituted the proximate cause of the injury or damage for which the action is brought. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973).

**The rationale of excluding owners in possession and control** is understandable. The owner in possession and control is in the best position in the exercise of diligence to acquire accurate and precise knowledge of any defective improvement to his real property. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973).

**Action by Owners in Possession Is Governed by § 1-52(5).** — An action by owners in possession of real property against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property is governed by § 1-52(5), the three-year statute of limitations, rather than by subdivision (5) of this section. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973).

**Quoted** in Shuler v. Gaston County Dyeing Mach. Co., 30 N.C. App. 577, 227 S.E.2d 634; North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

**Stated** in State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

## § 1-51. Five years.

**Applied** in Poore v. Norfolk-Southern Ry., 30 N.C. App. 104, 226 S.E.2d 170 (1976).

**§ 1-52. Three years.** — Within three years an action —

(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

(2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.
(3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.
(4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.
(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
(6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.
(7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.
(8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.
(9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.
(10) Repealed by Session Laws 1977, c. 886, s. 1.
(11) For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress.
(12) Upon a claim for loss covered by an insurance policy which is subject to the three-year limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-176(c).
(13) Against a public officer, for a trespass, under color of his office.
(14) An action under Chapter 75B of the General Statutes, the action in regard to a continuing violation accrues at the time of the latest violation.
(15) For the recovery of taxes paid as provided in G.S. 105-267 and G.S. 105-381. (C. C. P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C. S., s. 441; 1945, c. 785; 1971, c. 939, s. 1; 1975, c. 252, ss. 2, 4; 1977, c. 886, s. 1; c. 916, s. 2; c. 946, s. 4.)

V-A. Subdivision (5) — Injury to Person or Rights of Another.
XII. Subdivision (13) — Action against Public Officer.

## I. IN GENERAL.

**Editor's Note. —**

The 1971 amendment, effective Jan. 1, 1972, added subdivision (12).

The 1975 amendment, effective Jan. 1, 1976, substituted "either state or federal" for "other than a penalty or forfeiture" in subdivision (2) and added subdivision (13).

The deleted first 1977 amendment repealed subdivision (10).

The second 1977 amendment, effective Jan. 1, 1978, added subdivision (14).

The third 1977 amendment added subdivision (15).

Session Laws 1977, c. 886, s. 4, and c. 946, s. 5, provide that the acts shall not affect pending litigation.

For note on when a cause of action accrues for limitations purposes in medical malpractice — the discovery rule, see 6 Wake Forest Intra. L. Rev. 532 (1970). For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**The purpose of a statute of limitations** is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Statutes of Limitations Characterized. —** Statutes of limitation may be characterized as a right not to be sued beyond the time limited. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

**Statutes of limitations are inflexible and unyielding.** They operate inexorably without reference to the merits of plaintiff's cause of action. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970); Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971); Plott v. Wachovia Bank & Trust Co., 12 N.C. App. 694, 184 S.E.2d 384 (1971).

**Statutes of limitations are statutes of repose,** intended to require that litigation be initiated within the prescribed time or not at all. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Burden of Proving Section. —**

The statute of limitations having been pleaded, the burden is on the plaintiff to show that his cause of action against the defendant accrued within three years prior to the institution of the suit. State v. Cessna Aircraft Corp., 9 N.C. App. 557, 176 S.E.2d 796 (1970).

When a defendant pleads the three-year statute of limitations, he thereby places upon plaintiff the burden of showing that the action was instituted within the prescribed period. Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

**Failure to Sustain Burden. —**

If plaintiff fails to introduce evidence to carry the burden of proving that the action was instituted within the prescribed period, the trial judge can allow a defense motion for a directed verdict. Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

**When Cause of Action Accrues. —**

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

Insofar as the time of the accrual of the cause of action for the commencement of the running of the statute of limitations is concerned, there is no difference between a cause of action for negligent damage to property, and a cause of action for negligent injury to person. Land v. Neill Pontiac, Inc., 6 N.C. App. 197, 169 S.E.2d 537 (1969).

The cause of action accrued, and the statute of limitations began running with respect to plaintiff's claim under the uninsured motorist provisions of the insurance policy issued by defendant, at the time damages were sustained, and not, as the plaintiff contended, when demand for payment under the policy was made and refused by defendant. Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The claim accrues at the time of the invasion of the right, and nominal damages, at least, flow from such invasion. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

In an action to recover damages from defendant attorneys-at-law, for failing properly to file a cause of action on behalf of the plaintiff, the claim accrued at the time of the filing of the defective summons. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 176 S.E.2d 751 (1970); Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976).

**When the statute, etc. —**

In accord with original. See Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 176 S.E.2d 751 (1970); Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

Once the statute of limitations begins to run against an action, it continues to run. Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971).

Once the period of limitation begins to run nothing stops it. Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

**Right of Defendant to Rely on Statute as a Defense. —** The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**The court has no discretion when considering whether a claim is barred** by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Effect of Equity, etc. —**

The doctrine of equitable estoppel will toll a limitation only when it is the defendant himself who has misled the plaintiff in such a manner as to make strict application of the limitation inequitable. Camack v. Hardee's Food Sys., 410 F. Supp. 469 (M.D.N.C. 1976).

**Question of Law and Fact. —**

Ordinarily, the bar of the statute of limitations is a mixed question of law and fact, but where the bar is properly pleaded and all the facts with reference thereto are admitted, the question of limitations becomes a matter of law. Yancey v. Watkins, 17 N.C. App. 515, 195 S.E.2d 89, cert. denied, 283 N.C. 394, 196 S.E.2d 277 (1973).

Whether a cause of action is barred by a statute of limitation is a mixed question of law and fact, and where the facts are admitted or established, the trial court may sustain the plea to dismiss as a matter of law. Where, however, the evidence is sufficient to support an inference that the cause of action is not barred, the issue is for the jury. Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

**Operation of Statute Not Interrupted by Unavailability of Information.** — The unavailability of information concerning a fact which must be proved in order for a plaintiff to recover does not interrupt or delay the operation of the statute of limitations. Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

**The fact that a person, in good faith, pursued another remedy,** which turned out to be unavailable, does not extend the time allowed by the statute for the institution of another action. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

**Mere Assertion Is Insufficient Plea of Statute.** — The mere assertion, without any allegation of facts to support it, that the plaintiff's cause of action is barred by the statute has repeatedly been held insufficient to constitute the plea in bar. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

**If the plaintiff's claim is barred by the running of the statute of limitations,** defendant is entitled to judgment as a matter of law and summary judgment, under § 1A-1, Rule 56, is appropriate. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**A judgment on the pleadings** in favor of a defendant on defendant's plea in bar of the statute of limitations is proper when all the facts necessary to establish said plea are alleged or admitted in plaintiff's pleadings. Land v. Neill Pontiac, Inc., 6 N.C. App. 197, 169 S.E.2d 537 (1969).

A judgment on the pleadings based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the nonmovant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**Application Where Plaintiff Alleges Negligence and Breach of Warranty.** — Where the theories upon which plaintiff seeks to recover damages are negligent failure to repair and breach of warranty of material and workmanship in the repair contract, the period prescribed for the commencement of this action, whether regarded as arising out of contract or of tort, is three years. Employers Com. Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972).

In an action by an insurer for damages because of defendant's alleged breach of warranty and negligent failure to repair properly a furnace transformer for the insured, the statute of limitations began to run at the time of completion and delivery of the repaired transformer to the insured, and not at a later time when the insured received it and had an opportunity to inspect it. Employers Com. Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972).

The statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product, not the date of the ultimate failure of the product or the injury. Employers Com. Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972).

**Relation Back of Amended Complaint.** — Where the original pleadings clearly gave notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleadings, and the essential details of the alleged events were alleged in substantially the same fashion in both the original and the amended complaints, the original pleadings placed defendants on notice of the events involved and the amended complaint related back for purposes of the statute of limitations. Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971).

**Title VII Litigation.** — While a State statute of limitations may have some relation to the degree of relief afforded in Title VII litigation, the crucial time limitation for the original filing of the Title VII claim is determined by Title VII itself. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1976).

On the issue of whether the Title VII action is barred by State statutes of limitations, courts have ruled in favor of the tolling when Equal Employment Opportunities Commission charges are filed. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1976).

**42 U.S.C. § 1981 Claims Controlled by Section.** — Regardless of whether an action brought under 42 U.S.C. § 1981 is considered an action in contract or an action in tort, the appropriate North Carolina statute of limitations is three years under this section. Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397 (M.D.N.C. 1975).

The federal courts entertaining § 1981 claims have adopted the most closely analogous State statute of limitations, and since § 1981 guarantees equal contract rights to black citizens, the most closely analogous State statute of limitations is this section. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1976).

**And Filing Charge with E.E.O.C. on Same Facts Does Not Toll Running of Limitation.** — The mere filing of a charge with the Equal Employment Opportunity Commission under 42 U.S.C. § 2000e-5(e) does not toll the running of the statute of limitations on a 42 U.S.C. § 1981 claim based upon the same set of facts. Camack v. Hardee's Food Sys., 410 F. Supp. 469 (M.D.N.C. 1976).

**Applied** in Wall v. Flack, 15 N.C. App. 747, 190 S.E.2d 671 (1972); Ford Motor Credit Co. v. Minges, 473 F.2d 918 (4th Cir. 1973); Little v. Rose, 21 N.C. App. 596, 205 S.E.2d 150 (1974); Brantley v. Meekins, 22 N.C. App. 683, 207 S.E.2d 377 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702 (1975); Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Howard v. Hamilton, 28 N.C. App. 670, 222 S.E.2d 913 (1976); Shuler v. Gaston County Dyeing Mach. Co., 30 N.C. App. 577, 227 S.E.2d 634 (1976); Pinkston v. Baldwin, Lima, Hamilton Co., 292 N.C. 260, 232 S.E.2d 431 (1977).

**Quoted** in Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970).

**Cited** in Estridge v. Crab Orchard Dev. Co., 5 N.C. App. 604, 169 S.E.2d 53 (1969); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970); Henry v. Henry, 18 N.C. App. 60, 196 S.E.2d 33 (1973); Webb v. Nolan, 361 F. Supp. 418 (M.D.N.C. 1972), aff'd, 484 F.2d 1049 (4th Cir. 1973); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Poore v. Norfolk-Southern Ry., 30 N.C. App. 104, 226 S.E.2d 170 (1976).

## II. SUBDIVISION (1) — CONTRACTS.

**Warranty That Subject Matter of Sale Is Sound.** — Where there is a warranty that the subject matter of a sale is sound at the date of sale, then the statute of limitations begins to run at the date of the warranty and not thereafter. Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969).

Where a warranty that the subject matter of a sale is sound has been construed as a contract by the vendor that if the vendee shall suffer damages resulting from a prospective as well as a present condition, it has been held that the statute of limitations runs from the date on which the vendee discovered or should have discovered the breach of warranty; in other cases it has been held that the statute begins to run only after the lapse of a reasonable time within which both the vendor and the vendee had an opportunity to discover, by test, whether or not there has been a breach of the warranty. In the latter case, it has been said that where the vendor and the vendee, as contemplated by them when the contract was entered into, were engaged for some time after the date of the warranty in making tests to determine whether or not there had been a breach of the warranty, this time was a criterion as to the time required for that purpose. Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969).

**A cause of action for breach of express and implied warranties** accrued, not when the crop of soybeans was harvested in September, 1967, but at the time defendant sold the soybean seeds to plaintiffs in March, 1967. Hall v. Gurley Milling Co., 347 F. Supp. 13 (E.D.N.C. 1972).

**Breach of Agreement or Tortious Invasion of Right.** — Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in § 1-17. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**Failure of Complaint to Allege Subsequent Breach.** — Whether the claim sounds in contract or in tort makes no difference in regard to the outcome where the complaint, if it in fact sounds in contract, fails to allege any subsequent breach of the contract that would begin anew the running of the statute of limitations. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**It is unimportant that the actual or the substantial damage does not occur until later** if the whole injury results from the original tortious act. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**Or That Consequences Are Not Discovered or Discoverable When Cause of Action Accrues.** — It is unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**Indemnity Arising from Primary-Secondary Liability.** — Since indemnity arising from primary-secondary liability is a quasi-contractual right, it is subject to the three-year statute of limitations under subdivision (1). Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

Where one person's liability for a tort or breach of warranty committed by another is secondary, the statute of limitations does not start running against his right to indemnity from the party primarily liable until he has paid damages to the injured party. Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

The right to sue for indemnity for damages resulting from the negligence, misfeasance or malfeasance of another does not accrue until legal payment has been made. Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

**Accrual of Action for Compensation Absent Arrangement as to Time for Compensation.** — Where recovery of compensation for services rendered is sought upon implied contract or quantum meruit, and the arrangement is for indefinite and continuous service, without any definite arrangement as to time for compensation, and payment may be required toties quoties, the implied promise is to pay for services as they are rendered, and payment may be required whenever any are rendered; and thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

**When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies, etc.** —

Where recovery of compensation for services rendered is sought upon implied contract or quantum meruit, and where it is agreed that compensation is to be provided in the will of recipient, the cause of action accrues when the recipient dies without having made the agreed testamentary provision. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

**Or When Contract Is Abandoned.** — Where recovery of compensation for services rendered is sought upon implied contract or quantum meruit, and it was agreed that services were to be rendered during the life of recipient and compensation was to be provided in the will of recipient, and the contract has been abandoned, the cause of action accrues at the time of abandonment of the contract. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

**Action under Uninsured Motor Vehicle Policy.** — Action against an insurer, brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy to recover damages for a death caused by the wrongful act of an uninsured motorist, is subject to the two-year statute of limitations prescribed for the commencement of the tort action for wrongful death by § 1-53(4), and not the three-year limitation prescribed for actions on contract by subdivision (1) of this section. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

**Applied** in Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

## III. SUBDIVISION (2) — LIABILITY CREATED BY STATUTE.

**Creditor's Action for Relief under § 23-1.** — The three-year statute of limitation applies to a creditor's action for relief under § 23-1. Wilson v. Crab Orchard Dev. Co., 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

**An action to enforce liability under § 49-15** is barred after three years under subdivision (2), and since each time a mother makes an expenditure reasonably incurred for the support of a child such expenditure creates in her a new right to reimbursement, subdivision (2) begins to run against each expenditure on the date when the expenditure was made. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

**Claims under Fourteenth Amendment.** — Where plaintiff makes a claim against defendants under the Fourteenth Amendment to the United States Constitution and while this alleged liability is created not by federal statute but by the Constitution itself, it is more akin to "liability created by statute" than to common-law assault and battery so that subdivision (2) is applicable to this claim. Feilder v. Moore, 423 F. Supp. 62 (W.D.N.C. 1976).

**Claims under 42 U.S.C. § 1983.** — Subdivision (2) is applicable to those claims asserted under 42 U.S.C. § 1983. Feilder v. Moore, 423 F. Supp. 62 (W.D.N.C. 1976).

## IV. SUBDIVISION (3) — TRESPASS UPON REALTY.

**Proceeding to Recover Furniture from Home of Mother.** — In a claim and delivery proceeding instituted by plaintiff in 1971 to recover furniture from the home of his mother, who died in 1960, the trial judge made no finding of fact as to when plaintiff's cause of action accrued, and in the absence of such a finding of fact there was no basis on which to conclude as a matter of law that plaintiff's cause of action had been barred by the three-year statute of limitation. Hodges v. Johnson, 18 N.C. App. 40, 195 S.E.2d 579 (1973).

## V. SUBDIVISION (4) — GOODS OR CHATTELS.

**Cited** in Hodges v. Johnson, 22 N.C. App. 308, 206 S.E.2d 318 (1974).

## V-A. SUBDIVISION (5) — INJURY TO PERSON OR RIGHTS OF ANOTHER.

**Statute Applicable in Action for Personal Injuries.** — The three-year statute of limitations applied in an action for personal injuries allegedly received by the plaintiff as the result of negligence on the part of the defendant. Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971).

**When Statute Begins to Run.** — The statute of limitations by its terms begins to run after the action has "accrued." A suit does not involve an "injury to the person or rights of another" until the plaintiff is hurt. Where plaintiff was injured in an accident allegedly caused by failure of a tire, there was no "injury" and no basis for action until the wreck occurred. Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969).

The courts of this State have consistently held that the statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product (not the date of the ultimate failure of the product or the injury). Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

The negligence of the defendant would confer no right of action upon the plaintiff's intestate until he suffered an injury proximately caused thereby. Until then, his cause of action was not complete and, nothing else appearing, the three-year statute would not begin to run against his right to sue. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

The three-year statute of limitations began to run against a minor plaintiff's claim when a next friend was appointed for the special purpose of instituting an action on the claim. Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971).

**Claim for Injury Arising from Use of Product.** — A claim for relief against an automobile manufacturer for damages allegedly resulting from a defect in the steering mechanism of plaintiff's automobile accrued on the date plaintiff purchased the automobile and was barred by the three-year statute of limitations, the action having been commenced prior to the effective date of § 1-15(b). Bradley v. Lewis Motors, Inc., 12 N.C. App. 685, 184 S.E.2d 397 (1971).

A cause of action against a chair manufacturer for an injury arising out of the use of the chair in a restaurant was held to accrue when the chair was sold to the restaurant owner and not when the injury occurred. Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972). But see § 1-15(b).

A plaintiff, who instituted a personal injury action for the negligent manufacture or design of a lawn mower more than three years from the date of its purchase, but within three years from the date of his injury, was barred by the three-year statute of limitations. Green v. M.T.D. Prods., Inc., 333 F. Supp. 92 (M.D.N.C. 1970), aff'd, 449 F.2d 757 (4th Cir. 1971).

**Action for Negligent Manufacture, etc., of Heating and Cooling Equipment.** — An action by owners in possession of real property against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property is governed by subdivision (5) of this section, the three-year statute of limitations, rather than by § 1-50(5), the six-year statute. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973).

**Amended Complaint.** — Where the pending action in which an amended complaint was filed had been instituted prior to the expiration of three years from the date of the alleged events, and the amended complaint related back to the date of the original pleading, the plaintiff's action for malicious prosecution was not barred by the statute of limitations. Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971).

**Applied** in Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

## IX. SUBDIVISION (9) — FRAUD OR MISTAKE.

**Scope of Words, etc.**—

It will be noted from the language, "relief on the ground of fraud," that subdivision (9) has and was intended to have broader meaning than the ordinary common-law actions for fraud and deceit, and clearly applies to any and all actions legal or equitable where fraud is the basis or an essential element of the action. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**Subdivision (9) applies to all actions where fraud is the basis or an essential element.** Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**And fraud is the gist of forgery.** Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**Claims Grounded on Alleged Forgery.** — The same reasons that induced enactment of a statute of limitations for relief on the grounds of fraud under subdivision (9) are equally relevant to claims grounded on alleged forgery. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**When Statute Begins to Run.** —

In accord with 2nd paragraph in original. See Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973).

In accord with 3rd paragraph in original. See Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

An action for fraud accrues when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered. Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976).

**When Statute Begins to Run — Reformation of Deed.** — In an action to reform a deed on grounds of mistake, whether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflicting. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

In an action to reform a deed on grounds of mistake, failure to exercise due diligence in discovering a mistake has been determined as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**An action to set aside a deed on the grounds of forgery** is an action for relief on the grounds of fraud. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**Is Barred after Three Years from Date of Knowledge of Forgery.** — And such an action is barred after three years from the date of knowledge of the forgery of subdivision (9). Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**Cited** in Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971).

## § 1-53. Two years.

### I. SUBDIVISION (1)—POLITICAL SUBDIVISIONS OF STATE.

**Cited** in Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243 (1976).

### II. SUBDIVISION (2) — PENALTY FOR USURY.

**Editor's Note.** — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

**Cited** in Hodge v. First Atl. Corp., 10 N.C. App. 632, 179 S.E.2d 855 (1971); Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975).

### IV. SUBDIVISION (4) — DEATH BY WRONGFUL ACT.

**Two-Year Period Is Not Condition Precedent.** — The two-year period now prescribed for the commencement of a wrongful death action is not a condition precedent annexed to the cause of action as was the one-year limitation specified in § 28-173 prior to its amendment in 1951. It is a statute of limitations. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

This section is a statute of limitations, not a provision establishing a condition precedent to a cause of action. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

**Section 1-15(b) Not Intended to Affect Accrual Date of Wrongful Death Action.** — The legislature indicated by its excepting phrase in § 1-15(b) that it did not wish by that section to permit an action for wrongful death, whether one arising out of a product defect or otherwise, to be begun more than two years after death; it intended that § 1-53(4) should continue to control the accrual date of actions for wrongful death and the time when the statute of limitations should begin to run. Arrowood v. GMC, 539 F.2d 1321 (4th Cir. 1976).

**Wrongful Death Due to Defect in Machinery.** — A cause of action brought under this section for wrongful death due to a defect in machinery is governed by subdivision (4) of this section and accrues on the date of decedent's death. Pinkston v. Baldwin, Lima, Hamilton Co., 29 N.C. App. 604, 225 S.E.2d 147 (1976), aff'd, 292 N.C. 260, 232 S.E.2d 431 (1977). (Decided under former § 28-173.)

**Although a cause of action was available to plaintiff under** § 109-34 with its attendant six-year statute of limitations, plaintiff chose to bring an action for wrongful death allegedly caused by the negligence of the defendant officers in not providing medical attention for plaintiff's jailed intestate, and the two-year statute of limitations provided for in subsection (4) of this section was applicable; therefore, plaintiff is entitled to his day in court on his wrongful death action where plaintiff's intestate was imprisoned on September 13, 1971, and died on the next day, and the action was commenced on September 12, 1973. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

**The commencement of a wrongful death action by a foreign administrator** will not operate to bar the running of this section, such action being a nullity and subject to dismissal. Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 205 S.E.2d 353 (1974); Sims v. Rea Constr. Co., 25 N.C. App. 472, 213 S.E.2d 398 (1975).

**Action Brought by Party Who Has Not Been Appointed Personal Representative.** — A party who has not been appointed as administratrix and has not offered herself for qualification may not, upon a false allegation that she has qualified as administratrix, commence an action for wrongful death and, following the expiration of the statute of limitations, validate that action by a subsequent appointment as administratrix. Reid v. Smith, 5 N.C. App. 646, 169 S.E.2d 14 (1969).

Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she has been duly appointed and has qualified as such, and thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute. Reid v. Smith, 5 N.C. App. 646, 169 S.E.2d 14 (1969).

**Widow's belated qualification as administratrix does not relate back** to the date of the filing of the suit when no attempt was previously made to qualify as administrator in North Carolina. Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 205 S.E.2d 353 (1974).

**Substitution of Resident Administrator Qualifying after Expiration of Two-year Period.** — Since no attempt was made to qualify a resident administrator until after expiration of the statute of limitations set forth in subdivision (4), substitution of the resident administrator would not relate back and validate the present unauthorized action. Sims v. Rea Constr. Co., 25 N.C. App. 472, 213 S.E.2d 398 (1975).

**Action under Uninsured Motor Vehicle Policy.** — Action against an insurer, brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy to recover damages for a death caused by the wrongful act of an uninsured motorist, is subject to the two-year statute of limitations prescribed for the commencement of the tort action for wrongful death, and not the three-year limitation prescribed for actions on contract. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

**Applied** in Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969); Groce v. Rapidair, Inc., 305 F. Supp. 1238 (W.D.N.C. 1969).

**Stated** in Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971).

**Cited** in Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

**§ 1-54. One year.** — Within one year an action or proceeding —

(1) Repealed by Session Laws 1975, c. 252, s. 5, effective January 1, 1976.

(7) Repealed by Session Laws 1971, c. 939, s. 2.

(8) As provided in G.S. 105-377, to contest the validity of title to real property acquired in any tax foreclosure action or to reopen or set aside the judgment in any tax foreclosure action. (C. C. P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C. S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2; 1971, c. 12; c. 939, s. 2; 1975, c. 252, s. 5; 1977, c. 886, s. 3.)

**Cross References.** —

For present limitation on action against a public officer for trespass under color of his office, see § 1-52(13).

**Editor's Note.** —

Session Laws 1971, c. 12, added to this section a new subdivision (7), reading as follows:

"(7) On a claim for loss covered by an insurance policy which is subject to the 12-month limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-176(c)."

Session Laws 1971, c. 12, was repealed, effective Jan. 1, 1972, by Session Laws 1971, c. 939, s. 2. See § 1-52, subdivision (12), and see the note to § 58-176.

The 1975 amendment, effective Jan. 1, 1976, repealed subdivision (1), which read "Against a public officer, for trespass under color of his office."

The 1977 amendment added subdivision (8).

Session Laws 1977, c. 886, s. 4, provides that the act shall not affect pending litigation.

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (1) and (7) are set out.

**Accrual of Action for Treble Damages under State Antitrust Law.** — A cause of action for treble damages under State antitrust laws accrues for the purpose of determining when a suit may be brought and also for the purpose of determining when the statute of limitations runs at the time that damage occurs. A single wrong may produce immediately ascertainable damages and also have a future speculative impact and potential injury. In such a situation the cause of action accrues and the period of limitations begins to run at different points in time, but in both instances at the time that the damages are ascertainable. Thomas v. Petro-Wash, Inc., 429 F. Supp. 808 (M.D.N.C. 1977).

When a private cause of action under State antitrust law is based upon a continuous invasion of one's rights, the plaintiffs' cause of action accrues from day to day as his rights are invaded to his damage. Thomas v. Petro-Wash, Inc., 429 F. Supp. 808 (M.D.N.C. 1977).

**Relation Back of Supplementary Pleadings.** — There can be no relation back of supplementary pleadings where at the time the suits were instituted no actionable damages existed, nor did the claims alleged become actionable within the time provided by statute for the instituting of suits in slander actions. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

The case law is not clearly developed on the extent to which a supplemental complaint will be held to relate back for statute of limitations purposes. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Subdivision (3) — Action for Slander.** — In a slander action, the claims did not become actionable within the time provided by statute for the institution of suits in slander actions, because the statute of limitations began to operate when the alleged false statements were made, and the first possible element of special damage occurred after the statute had run. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues and the action accrues at the date of the publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date. Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

**When plaintiff attempts to allege entirely different transaction by amendment,** as, for example, the separate publication of a libelous statement, the new claim will be subject to the defense of statute of limitations. Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

**Applied** in Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971); Priddy v. Cook's United Dept. Store, 17 N.C. App. 322, 194 S.E.2d 58 (1973); Feilder v. Moore, 423 F. Supp. 62 (W.D.N.C. 1976).

## § 1-55. Six months.

**Editor's Note.** —

The cases under this section in the bound volume were decided prior to passage of Session Laws 1969, c. 1001, ss. 1, 2, which deleted an action for slander from this section and inserted such action in subdivision (3) of § 1-54.

## ARTICLE 5A.

## *Limitations, Actions Not Otherwise Limited.*

## § 1-56. All other actions, ten years.

### I. IN GENERAL.

**Purpose, etc.** —

This is a catch-all section, designed to place an outer time limit on all actions not specifically covered by other sections of this Subchapter of the General Statutes. Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397 (M.D.N.C. 1975).

**When Statute Begins Running.** —

In the absence of a demand and refusal, the statute of limitations in an action to impose a constructive trust upon an administrator does not begin to run until the administrator completes and closes the administration. Moore v. Bryson, 11 N.C. App. 149, 180 S.E.2d 437 (1971).

**Right of Action for Legacies and Distributive Shares or for Accounting.** — "The right of action for legacies and distributive shares, or to have an accounting with an executor and a settlement, accrues two years from his qualification." Moore v. Bryson, 11 N.C. App. 149, 180 S.E.2d 437 (1971) quoting, Pierce v. Faison, 183 N.C. 177, 110 S.E. 857 (1922).

**Cited** in Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

## SUBCHAPTER III. PARTIES.

## ARTICLE 6.

## *Parties.*

## § 1-57. Real party in interest; grantees and assignees.

### I. REAL PARTIES IN INTEREST.

### A. In General.

**Cited** in State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

### B. Personal Actions.

**Applied** in Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977).

**§ 1-69.1. Unincorporated associations and partnerships; suit by or against.** — All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it. Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated. Any unincorporated association, organization, society, or general partnership bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68. (1955, c. 545, s. 3; 1975, c. 393, ss. 1, 2.)

**Editor's Note.** — The 1975 amendment, effective Oct. 1, 1975, inserted "or general or limited partnerships" near the beginning of the first sentence and substituted the present last sentence of the section for the former last sentence, which provided that the section should not apply to partnerships.

**Cited** in Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

## SUBCHAPTER IIIA. JURISDICTION.

### Article 6A.

### *Jurisdiction.*

### § 1-75.1. Legislative intent.

**Section 1A-1, Rule 4(j) is tied closely to this Article,** and the two are complementary to one another. While this Article greatly liberalizes the grounds for jurisdiction, the rules regarding service of process are tightened to insure as much as possible that the defendant receives actual notice of the controversy. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

**The provisions of this Article are to be construed liberally in favor of finding personal jurisdiction,** as long as such a finding is consistent with due process. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

**A prima facie presumption of rightful jurisdiction** arises from the fact that a court of general jurisdiction has acted in a matter. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**Cited** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

### § 1-75.2. Definitions.

**Applied** in Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

### § 1-75.3. Jurisdictional requirements for judgments against persons, status and things.

**Applied** in Bowdach v. Frontierland, Inc., 347 F. Supp. 233 (W.D.N.C. 1972); Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972).

**Quoted** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

### § 1-75.4. Personal jurisdiction, grounds for generally.

**Editor's Note.** —

For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970). For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For comment discussing the conflict of this section with § 1-21, see 12 Wake Forest L. Rev. 1041 (1976).

**This section is commonly referred to as the "long-arm" statute.** Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

**Purpose of Section.** — Provisions of this section are a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zuckerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977).

**This section is a procedural law** which does not affect substantive rights. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

**Accordingly, it can properly be applied retroactively.** Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

**Liberal Construction.** — It is clear both from the wording of this section and applicable case law that the provisions of this "long-arm" statute are to be liberally construed in favor of finding personal jurisdiction, consistent with due process limitations. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

This section should be liberally construed in favor of finding personal jurisdiction, subject to due process limitations. Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977).

While the provisions of the "long-arm" statute are to be liberally construed in favor of finding personal jurisdiction, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976).

To construe the terms as set forth in the provisos in subdivision (4) strictly so as to defeat in personam jurisdiction when such jurisdiction would be constitutionally permissible would conflict with the legislative and judicial mandate. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

**This section is based on Wisconsin "long-arm" statute.** Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

**Principal Subjected to "Long-Arm" Jurisdiction for Acts of Agents.** — A principal may be subjected to "long-arm" jurisdiction on account of the acts of his agent within the course and scope of his authority since it is reasonable and just according to our traditional conception of fair play and substantial justice. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

**Principal Includes Individual Defendants.** — Foreign corporations have been held subject to "long-arm" jurisdiction for acts of their agents under subdivision (4), and no reason appears to differentiate in this regard between the "defendant" mentioned in subdivision (4) and the "defendant" mentioned in subdivision (3). Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

It would be arbitrary to hold that principals are subject to "long-arm" jurisdiction if they are motorists, insurance companies, or foreign corporations, but not if they are individual governmental officials. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

**Test for Nonresidents Who Allegedly Abused High Governmental Powers.** — For those who have allegedly abused high governmental powers, the test is whether they reasonably could have anticipated that their activity would have consequences in the forum state. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

**Cause of Action Need Not Be Related to Defendant's Jurisdictional Activities.** — There is no requirement that the cause of action, pursuant to which the jurisdictional claim is raised, be related to the activities of the defendant which gives rise to the in personam jurisdiction. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

**The resolution of the question of in personam jurisdiction involves a two-fold determination.** First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant? If so, does the exercise of this power by the North Carolina courts violate due process of law? Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

**Due process, and not language of statute, is ultimate test of "long-arm" jurisdiction** over a nonresident. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977).

**Legislature Intended Full Jurisdictional Powers Permissible under Federal Due Process.** — By the enactment of subdivision (1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

**And Due Process Requires Minimum Contacts with Forum State.** — Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zuckerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976).

In order for jurisdiction to be exercised, the defendant must be found to have certain minimum contacts with the State of the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

The North Carolina courts carefully follow the "minimum contacts" standards set in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Unless a nonresident defendant has had "minimum contacts" with the forum state, that state may not exercise jurisdiction over him. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

**Determination as to Minimum Contacts.** — There are a number of factors, some essential and others only having weight, to be considered in determining whether the test of "minimum contacts" and "fair play" have been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

The question of whether in personam jurisdiction may be exercised within the confines of due process cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. In the application of this flexible test, a relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

Whether the type of defendant's activity conducted within the State is adequate to satisfy the requirements of due process depends upon the facts of the particular case. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

In determining whether subjection of a corporation to in personam jurisdiction in a foreign forum offends traditional notions of fair play and substantial justice, the interests of and fairness to both the plaintiff and the defendant must be considered and weighed. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

**If a foreign company's activity is regular, or systematic, or continuous,** minimum contacts exist. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

**Single Contract May Be Sufficient Minimal Contact.** — A single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base in personam jurisdiction, with respect to the parties so contracting. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973); Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974).

A single contract is sufficient under subdivision (5)(c) to satisfy the minimal contacts requirement. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

If a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

**Such as Promise to Pay Debt of Another.** — Where the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over the defendant. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

**And Contract for Sale of Real Property.** — A contract for the sale of real property executed in North Carolina concerning real property in North Carolina was sufficient minimal contact in this case on which to base in personam jurisdiction. Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974).

Where the record showed that defendant entered into a contract to purchase real property situated in North Carolina, formed a corporation in this State to receive the title, and thus invoked the benefits and protection of its laws, and the suit in question arose out of an alleged breach of that contract, assumption of in personam jurisdiction over defendant by the courts of this

State did not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment, and defendant's contacts with the State were sufficient to satisfy due process requirements. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

**Where foreign corporation obviously uses, benefits, or can easily use the laws** of North Carolina, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

**Where Only One, Noncontractual, Contact.** — If there is only one contact with North Carolina and such contact does not involve a contract to be performed here, there is no jurisdiction. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

**If a foreign corporation has never had any interest in North Carolina or contacts here,** even if it can reasonably be expected that its product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

**Evidence Sufficient to Establish Minimum Contacts.** — See Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976); Forman & Zuckerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977).

**Evidence Insufficient to Establish Minimum Contacts.** — See Marshall Exports, Inc. v. Phillips, 385 F. Supp. 1250 (E.D.N.C.), aff'd, 507 F.2d 47 (4th Cir. 1974); William R. Andrews Assocs. v. Sodibar Sys. of D.C., Inc., 28 N.C. App. 663, 222 S.E.2d 922, cert. denied, 289 N.C. 726, 224 S.E.2d 676 (1976); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

**The words "domicile" and "inhabitant"** mean substantially the same thing. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

One is an inhabitant of or domiciled in a given place if he resides there actually and permanently. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**The term "injury to the person or property" as used in subdivision (3)** of this section should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

An action for alimony on the ground of abandonment is a claim of "injury to person or property" under subdivision (3) of this section. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**Activities of Nonresident Corporation Owning Basketball Team Included within Subdivision (4).** — See Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

**Magazine advertisements are solicitations** within the meaning of subdivision (4)a of this section. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

**This section was intended to embrace "intangible injuries."** Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

**The application of a tolling statute such as § 1-21** when defendant has at all times been subject to the service of process under subdivision (5) of the present section by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

There is no need for a tolling statute when a nonresident defendant is amenable to process. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

That there is little need to give effect to a tolling statute when a nonresident is amenable to service that will confer personal jurisdiction does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

**The long-arm manner of personal service under § 1A-1, Rule** 4(j)(9)b may be made in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in the present section. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**Action for alienation of affections and for criminal conversation** is an action ex delicto and involves "injury to person or property" within the contemplation of this section. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**Burden.** — The plaintiff has the burden of showing the jurisdictional elements of subdivision (4) to be met. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

The burden is on the plaintiffs to prove the existence of jurisdiction, but that burden can be met by a prima facie showing that jurisdiction is conferred by a statute such as this one. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

**Contract Right Is "Asset or Thing of Value".** — A contract right is a property right. A fortiori, it is an "asset or thing of value." Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

**Situs of Contract Right.** — Where the holder of the contract right alleged is a North Carolina resident, the situs of the "asset or thing of value" is in this State. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

**Applied** in Bowdach v. Frontierland, Inc., 347 F. Supp. 233 (W.D.N.C. 1972); Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972); McCoy Lumber Indus., Inc. v. Niedermeyer-Martin Co., 356 F. Supp. 1221 (M.D.N.C. 1973); William R. Andrews Assocs. v. Sodibar Systems, 25 N.C. App. 372, 213 S.E.2d 411 (1975); Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975).

**Quoted** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Cited** in Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); Guthrie v. Ray, 31 N.C. App. 142, 228 S.E.2d 471 (1976).

**§ 1-75.7. Personal jurisdiction — grounds for without service of summons.** — A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

(1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance; or

(2) With respect to any counterclaim asserted against that person in an action which he has commenced in the State. (1967, c. 954, s. 2; 1975, c. 76, s. 1.)

**Editor's Note.** — The 1975 amendment added the proviso to subdivision (1).

Session Laws 1975, c. 76, s. 3, provides: "This act shall become effective October 1, 1975, and shall not affect any pending litigation."

**This section codifies the long-standing rule that a person making a voluntary appearance is subject to the court's jurisdiction** irrespective of whether jurisdiction over his person has been acquired previously in the manner prescribed by law. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

**This section has no counterpart in the federal practice.** Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**This section and § 1A-1, Rule 12 must be construed together** since they are a part of the same enactment. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**Section 1A-1, Rule 12 Does Not Abolish Concept of General Appearance.** — When § 1A-1, Rule 12 and this section are construed together, it is apparent that § 1A-1, Rule 12 does not abolish the concept of the voluntary or general appearance. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**Any Act Constituting General Appearance Obviates Necessity of Service.** — In this section the legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

Whether conduct which will dispense with the necessity of service of summons be denominated a general appearance, submission to the jurisdiction, or left unlabeled is immaterial; the effect of such conduct remains the same. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**Waiver of Right to Object to Personal Jurisdiction.** — The right to raise the objection to personal jurisdiction is waived only by failing to assert it within the time prescribed by § 1A-1, Rule 12. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

This section does not purport to set forth the time in which an objection to personal jurisdiction must be made, or how the objection is waived. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

Though he obtains an enlargement of time within which to file answer or other pleading and taking plaintiff's deposition, a defendant does not waive his defense of insufficiency of service of process. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Under this section as it stood before the 1975 amendment a voluntary appearance whereby a defendant obtained an extension of time in which to plead was held to be a general appearance which waived any defect in the jurisdiction of the court for want of valid summons or proper service thereof. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974); Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

After a defendant has submitted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert the defense that the court has no jurisdiction over his person either by motion or answer under § 1A-1, Rule 12 (b). Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**Cited** in Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

## § 1-75.8. Jurisdiction in rem or quasi in rem — grounds for generally.

**Applied** in Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

**Cited** in Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972).

**§ 1-75.10. Proof of service of summons, defendant appearing in action.** — While the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(4) Service by Registered Mail. — In the case of service by registered mail, by affidavit of the serving party showing the circumstances warranting the use of service by registered mail and averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered mail, return receipt requested,

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee, and

c. That the genuine receipt or other evidence of delivery is attached. (1967, c. 954, s. 2; 1969, c. 895, s. 14; 1973, c. 643.)

**Editor's Note.** —

The 1973 amendment, effective Oct. 1, 1973, added subdivision (4).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (4) are set out.

For article on the legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Applied** in In re Phillips, 18 N.C. App. 65, 196 S.E.2d 59 (1973); Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Cited** in Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

## § 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.

**Valid Judgment against Nonappearing Defendant.** — In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of § 1A-1, Rule 55, as well as this section. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Personal jurisdiction over a nonappearing defendant** for the purpose of the entry of a judgment by default is not presumed by the service of summons and an unverified complaint but must be proven and appear of record as required by this section. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Proof of service of summons is only part of the proof** necessary to establish grounds for personal jurisdiction before entering the judgment. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Proof Required Before Judgment Entered.** — Before a court may enter judgment in a case where defendant fails to appear in the action within apt time, this section requires proof by affidavit or other evidence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over a defendant. Bimac Corp. v. Henry, 18 N.C. App. 539, 197 S.E.2d 262 (1973).

**Summons, Certificate and Complaint Insufficient to Establish Jurisdiction for Default Judgment.** — The summons, the certificate of the officer serving it, and the unverified complaint are insufficient to establish the jurisdictional requirements for a default judgment. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Record Must Show Jurisdiction.** — For the failure of the record to show personal jurisdiction of the defendant by the court, the judgment entered was void and could be considered and treated as a nullity. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Complaint Signed by an Attorney Is Not Sufficient Basis for a Default Judgment.** — See opinion of Attorney General to Honorable Edwin S. Preston, Jr., 41 N.C.A.G. 625 (1971).

**Default judgment by the clerk is provided for by Rule 55(b)(1),** is subject to the jurisdictional proofs required by this section and is still controlled by § 1-209(4), which empowers the clerk to enter all judgments by default and default and inquiry as are authorized by Rule 55. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Cited** in Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

### § 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

**Applied** in Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862 (1971).

## SUBCHAPTER IV. VENUE.

## ARTICLE 7.

## *Venue.*

### § 1-76. Where subject of action situated.

#### I. IN GENERAL.

**Local and Transitory Actions, etc.** — In accord with original. See Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

An action to recover monetary damages for breach of a contract to construct a house is transitory and is not a local action within the meaning of subdivision (1), since plaintiff's purpose is not to recover real property, not to determine an estate or interest in land, and not to recover for damages to realty. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

If the principal object involved in an action is monetary damages, and plaintiffs do not seek a judgment that would affect an interest in land but seek a judgment in personam, it is not a local action within the meaning of subdivision (1), and defendants are not entitled to have the action removed as a matter of right. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Principal Object Involved Determines Whether Action Is Local.** — It is the principal object involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action will be held local. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**An action is not necessarily local because it incidentally involves the title to land or a right or interest therein.** Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Title to realty must be directly affected by the judgment,** in order to render the action local. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Stated** in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

#### II. ACTIONS RELATING TO REAL PROPERTY.

**Docketed judgments, etc.** — A lien created by a docketed judgment does not confer an estate or interest in real estate within the meaning of this section, but merely the right to subject the realty to the payment of the judgment by sale of the same under execution. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Notice of Claim of Lien Confers no Greater Right in Real Estate than Docketed Judgment.** — Mere notice of a claim of lien would not confer a greater right or interest in the real estate than a docketed judgment and would not bring this action within the purview of subdivision (1). Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Usurious Loan Evidenced by Deed of Trust on Real Property.** — The fact that an allegedly usurious loan is evidenced by a note secured by a deed of trust on real property does not make it an action affecting an interest in real property such that this section requires a change of venue. River Dev. Corp. v. Parker Tree Farms, Inc., 12 N.C. App. 1, 182 S.E.2d 211 (1971).

### V. RECOVERY OF PERSONAL PROPERTY.

**Section Does Not Apply, etc.** —

Where the subject of the action is a contract which plaintiff seeks to set aside, or, in the alternative, it is a fiduciary relationship which plaintiff alleges existed and was breached and for which he seeks monetary damages, and recovery of personal property is neither the sole nor is it the primary relief demanded, this section is not controlling. Klass v. Hayes, 29 N.C. App. 658, 225 S.E.2d 612 (1976)

**§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.** — Subject to the power of the court to change the place of trial as provided by law, actions to recover a deficiency, which remains owing on a debt after secured personal property has been sold to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated. (1977, c. 383, s. 1.)

**Editor's Note.** — Session Laws 1977, c. 383, s. 2, makes the act effective July 1, 1977.

## § 1-77. Where cause of action arose.

**This section does not apply to actions against the State.** Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**When Cause of Action Accrues.** — A cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Where Cause of Action Arose.** —

The cause of action arises in the county where the acts or omissions constituting the basis of the action occurred. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Any consideration of subdivision (2) involves two questions.** —

In accord with original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Acts Done by Virtue of Office.** — Where defendant is a public officer and the action arises from acts done or to be done by him in a county by virtue of his office, subdivision (2) applies and the action was properly removed to that county. King v. Buck, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

**Deputy sheriffs of a county are "public officers"** for purposes of the change of venue statute. Galligan v. Smith, 10 N.C. App. 536, 179 S.E.2d 193 (1971).

**Right to Have Case Moved Does Not Preclude Change of Venue under § 1-83.** — The fact that defendant is entitled under this section to have this case moved to a certain county does not preclude the court from changing the venue from that county to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under § 1-83. King v. Buck, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

## § 1-78. Official bonds, executors and administrators.

**Applied** in Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36 (1973).

**§ 1-79. Domestic corporations.** — For the purpose of suing and being sued the residence of a domestic corporation is as follows:

(1) Where the registered or principal office of the corporation is located, or

(2) Where the corporation maintains a place of business.

(3) If no registered or principal office is in existence, and no place of business is currently maintained or can reasonably be found, the term

"residence" shall include any place where the corporation is regularly engaged in carrying on business. (1903, c. 806; Rev., s. 422; C. S., s. 466; 1951, c. 837, s. 5; 1957, c. 492; 1973, c. 885; 1975, c. 111.)

**Editor's Note. —** The 1973 amendment added "or where the corporation maintains a principal place of business or is regularly engaged in carrying on business" at the end of subdivision (1).

The 1975 amendment, effective Jan. 1, 1976, rewrote this section.

**Domesticated foreign corporations, etc. —** A foreign corporation which duly domesticates in this State pursuant to § 55-138(a)(5) is to be treated like a domestic corporation for venue purposes. Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Domesticated foreign corporations have the right to sue and be sued in the courts of this State under the rules and regulations which apply to domestic corporations. Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

**Section Does Not Apply, etc. —** As to the domesticated foreign insurance corporation exception to the general rule that domesticated foreign corporations are treated like domestic corporations, see Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

**Proper Venue Where Defendant Was Domestic Corporation. —** Where both plaintiff and defendant were corporations and neither had its registered or principal office in Jackson County where the action was instituted, but defendant, a domestic corporation, had its principal and registered office in Wilkes County, Wilkes County was the proper venue. First Union Nat'l Bank v. Northwestern Bank, 18 N.C. App. 113, 196 S.E.2d 38 (1973).

**§ 1-80. Foreign corporations. —** An action against a corporation created by or under the law of any other state or government may be brought in the appropriate trial court division of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

(1) By a resident of this State, for any cause of action.

(2) By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.

(3) By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State. (C. C. P., s. 361; 1876-7, c. 170; Code, s. 194; Rev., s. 423; 1907, c. 460; C. S., s. 467; 1971, c. 268, s. 1.)

**Editor's Note. —** The 1971 amendment, effective July 1, 1971, substituted "appropriate trial court division" for "superior court" in the opening paragraph.

## § 1-81. Actions against railroads.

**Applied** in Poteat v. Southern Ry., 33 N.C. App. 220, 234 S.E.2d 447 (1977).

## § 1-82. Venue in all other cases.

**Section Pertains to Venue, etc. —** This section relates to venue as opposed to jurisdiction. Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

**Venue means a place where the trial of a cause may be held by a court with jurisdiction.** Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

**What Section Requires. —** This section requires that venue in civil actions not specifically provided for in §§ 1-76 through 1-81 must be in the county where either plaintiff or defendant resides at the commencement of the suit. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

**This section governs suits against the State on contracts** generally since there is no venue statute specifically applicable to the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Where an action is transitory,** either the county of residence of the plaintiff or that of the defendant is the proper venue. First Union Nat'l Bank v. Northwestern Bank, 18 N.C. App. 113, 196 S.E.2d 38 (1973).

**Evidence of Residence.** — Plaintiff's subsequent conduct in leasing an apartment, changing her mailing address to Buncombe County and enrolling her children in schools there tended to support her contention that she abandoned her former residence in Haywood County and that Buncombe County had been her permanent residence since that time. Clarke v. Clarke, 15 N.C. App. 576, 190 S.E.2d 390 (1972).

**Facts Found by Trial Judge in Determining Residency Are Conclusive on Appeal.** — Facts found by the trial judge in determining questions of residency raised in a motion to remove a case on grounds of improper venue are conclusive on appeal if supported by competent evidence. Clarke v. Clarke, 15 N.C. App. 576, 190 S.E.2d 390 (1972).

**Action by Administrator.** —

Under this section an action by an administrator is properly brought in the county where the administrator resides rather than in the county where the decedent lived or in which the administrator qualified. Klass v. Hayes, 29 N.C. App. 658, 225 S.E.2d 612 (1976).

**Nonresident Plaintiffs.** —

Where plaintiff was a nonresident and defendants were residents of North Carolina, the proper venue for trial of an action for false arrest was a county in this State in which the defendants, or any of them, resided at its commencement. Chow v. Crowell, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

Where plaintiff and defendant are corporations and neither has its registered or principal office in Jackson County where the action was instituted, but defendant, a domestic corporation, has its principal and registered office in Wilkes County, Wilkes County is the proper venue. First Union Nat'l Bank v. Northwestern Bank, 18 N.C. App. 113, 196 S.E.2d 38 (1973).

**Domesticated Foreign Corporation Treated like Domestic Corporation.** — A foreign corporation which duly domesticates in this State pursuant to § 55-138(a)(5) is to be treated like a domestic corporation for venue purposes. Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

**Unless It Is Insurance Corporation.** — See Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

**Applied** in Barker v. Hicks, 12 N.C. App. 407, 183 S.E.2d 431 (1971); Poteat v. Southern Ry., 33 N.C. App. 220, 234 S.E.2d 447 (1977).

**Cited** in Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

## § 1-83. Change of venue.

### I. IN GENERAL.

**Venue is not jurisdictional. etc.** —

Venue is not jurisdictional. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

**This section allows removal to a nonadjoining county.** Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Removal of a case "when the convenience of witnesses and ends of justice would be promoted" under the provisions of this section is not limited to removal to an adjoining county. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

**Power of Court after Proper Motion for Change of Venue.** — Where a motion asserting improper venue is made in writing and in apt time, the question of removal becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

In the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

**Change Not Precluded by Right under § 1-77 to Have Case Moved.** — The fact that defendant is entitled under § 1-77 to have this case moved to a certain county does not preclude the court from changing the venue from that county to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under this section. King v. Buck, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

**Applied** in Barker v. Hicks, 12 N.C. App. 407, 183 S.E.2d 431 (1971); Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

**Cited** in Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

### II. THE APPLICATION FOR REMOVAL.

#### A. Time of Demand.

**Defense of improper venue may be raised in the answer** if no pre-answer motions have been made. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

**Subdivision (2) Motion Not Entertained until Answer Filed.** — The court has no authority to entertain a motion under subdivision (2) of this section until an answer has been filed. Poteat v. Southern Ry., 33 N.C. App. 220, 234 S.E.2d 447 (1977).

### C. Form and Contents of Demand.

**Motion Need Not Be Verified.** — Nothing in the Rules of Civil Procedure requires that motion for removal be verified. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

## III. WAIVER OF RIGHT TO CHANGE.

**Effect of Failure to Comply, etc.** — Sections 1-76 to 1-83 relate to venue, not jurisdiction, and an objection to the wrong venue is waived if not made in apt time. Collyer v. Bell, 12 N.C. App. 653, 184 S.E.2d 414 (1971).

Venue may be waived unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

## IV. APPEAL.

### A. Where County Designated Not Proper.

**No Discretion in Court.** — The trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

### B. Convenience of Witnesses and Ends of Justice Promoted.

**Discretion of Court.** — A motion to remove when the convenience of witnesses and ends of justice would be promoted is addressed to the sound discretion of the trial judge. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

The trial court is necessarily required to exercise discretion in choosing between the two motions to remove by two different defendants in the same case. Chow v. Crowell, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

The trial court committed no error in considering two motions to remove by two defendants in the same case at the same time, and that court was not required to give precedence to one motion or the other because of the order in which they may have been filed. Chow v. Crowell, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown. Phillips v. Currie Mills, Inc., 24 N.C. App. 143, 209 S.E.2d 886 (1974).

**The rule of law governing motions for removal** for the causes specified, is thus declared: The distinction seems to be where there are no facts stated in the affidavit as grounds for the removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

**§ 1-84. Removal for fair trial.** — In all civil actions in the superior and district courts, when it is suggested on oath or affirmation on behalf of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed for trial to any adjacent county, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by oral evidence or affidavits. (1806, c. 693, s. 12, P. R.; 1879, s. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C. S., s. 471; 1957, c. 601; 1969, c. 44, s. 1; 1971, c. 268, s. 2; 1977, c. 12.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "district" for "criminal" near the beginning of the first sentence, made changes in the former proviso to the first sentence and in the former third sentence, which were deleted by the 1977 amendment, and deleted the former last sentence, relating to payment of costs and jurors' fees.

The 1977 amendment deleted "and criminal" following "civil" and "of the State or the traverser of the bill of indictment, or" preceding "of the plaintiff" near the beginning of the section and substituted "for trial to any adjacent county" for "to some adjacent county for trial" and inserted "oral evidence or" near the end of the section. The amendment also deleted a former proviso and the former second and third sentences of the section, which related to objection and appeal by a defendant where a case was removed on motion of the solicitor.

**Inherent Power of Trial Judge to Order Removal Ex Mero Motu.** — In addition to the express statutory authority granted in this section, the judge of superior court has the inherent discretionary power to order a change of venue ex mero motu when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

The sworn testimony of witnesses at the trial and the court's own observation of the events transpiring at the trial furnish a sufficient basis for the court to invoke its inherent discretionary power to order the removal in the furtherance of justice. The fact that plaintiffs had filed and later renewed a motion to remove would not compel the court to proceed only under the statutory authority and to forego exercise of its inherent judicial power. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

**Discretion of Trial Judge.** —

In accord with 3rd paragraph in original. See State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 925 (1972).

A motion to remove for prejudice under this section is addressed to the sound discretion of the trial judge. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969); State v. Halton, 19 N.C. App. 646, 199 S.E.2d 708 (1973), cert. denied, 284 N.C. 619, 201 S.E.2d 691 (1974).

A defendant's motion for a change of venue and his alternative motion for a special venire from another county are addressed to the sound legal discretion of the trial court. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that a fair and impartial trial cannot be obtained in the county in which the action is pending, is addressed to the sound discretion of the trial court. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

A defendant's motions for a change of venue or for a special venire from another county on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, were addressed to the sound legal discretion of the trial court, whose ruling in denying these motions was not disturbed on appeal because (1) the newspaper articles filed in support of the motions were not unduly inflammatory in nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) those of the prospective jurors who had read the newspaper accounts stated that they could return an impartial verdict. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

A motion by defendant for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity is addressed to the sound discretion of the court. State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971).

Motions for a change of venue and for a continuance are addressed to the court's discretion. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974).

Defendant's motions for a change of venue or for a special venire due to the publicity in the various news media concerning the offenses of murder, rape, kidnapping and armed robbery with which he was charged were directed to the discretion of the trial court, who did not abuse that discretion in their denial of the motions since the newspaper stories were within the normal limits of newspaper reporting of criminal activity and since defendant offered no evidence that such publicity was more widespread in the county in question than in any other county to which the case might have been removed in accordance with this section. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L.Ed.2d 1206 (1976).

A motion for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity is addressed to the sound discretion of the court, and absent a showing of abuse of discretion, the decision of the trial court is not reviewable. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings will not be disturbed on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

**The burden of proof on a motion under this section is on the moving party.** State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 925 (1972).

The burden is on the moving party to show abuse of discretion or prejudice. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 878, 201 S.E.2d 878 (1974).

**Second Exercise of Discretion in Light of Changed Situation.** — On a motion for change of venue the court must exercise its discretion in the light of the situation existing when the decision is made. Should thereafter some significant change occur, it may become necessary, in the interest of assuring a fair trial, that the trial court be called upon again to exercise its discretion. In such case the discretion should be exercised in the light of the changed situation, and there is nothing in this section or in the rule which limits the power of one superior court judge to reverse a judgment of another, which prevents that this be done. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

**Case Must Be Removed to Adjoining County.** — Removal of a case for a "fair trial" under the provisions of this section is limited to removal to an adjoining county. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

**Appeal.** —

In accord with 3rd paragraph in original. See Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Where facts are set forth in the affidavit, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit as grounds for removal, the ruling of the trial court may be reviewed on appeal. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

**Applied** in State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975).

**Cited** in State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973).

### § 1-85. Affidavits on hearing for removal; when removal ordered.

**This section refers only to § 1-84** (removal for fair trial) and not to § 1-83 (removal where county designated not proper). Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

**When a motion to remove is made, facts must be stated particularly and in detail in the** affidavit, or judicially admitted, showing the grounds for such removal. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969); State v. Halton, 19 N.C. App. 646, 199 S.E.2d 708 (1973), cert. denied, 284 N.C. 619, 201 S.E.2d 691 (1974).

## SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

## ARTICLE 8.

## *Summons.*

**§§ 1-92, 1-93:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

**§§ 1-98.1 to 1-98.4:** Repealed by Session Laws 1971, c. 1093, s. 19.

**§§ 1-99.1 to 1-99.4:** Repealed by Session Laws 1971, c. 1093, s. 19.

**§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.** — The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator.

Service of such process shall be made in the following manner:

(1) By leaving a copy thereof, with a fee of three dollars ($3.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section, shall be sufficient service upon the said nonresident.

(2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section, must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as if provided in the case of a nonresident motorist.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646; 1953, c. 796; 1955, c. 1022; 1961, c. 1191; 1963, c. 491; 1967, c. 954, s. 4; 1971, c. 420, s. 2; 1975, c. 294.)

**Editor's Note.** — This section was repealed, effective Jan. 1, 1970, by Session Laws 1967, c. 954, s. 4.

Session Laws 1971, c. 420, s. 1, effective July 1, 1971, provides: "Section 4 of Chapter 954 of the 1967 Session Laws is hereby amended by deleting G.S. 1-105 and G.S. 1-105.1 from the list of repealed General Statutes sections."

The 1975 amendment, effective July 1, 1975, increased the fee for service of process in subdivision (1) from $1.00 to $3.00.

For case law survey on process, see 41 N.C.L. Rev. 524. For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965). For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For an article, "Modern Statutory Approaches to Service of Process outside the State — Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act," see 49 N.C.L. Rev. 235 (1971).

**Purpose of Section.** — The broad purpose of this section is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

The evident purpose of this section is to extend the State's judicial power broadly to permit North Carolina residents to acquire jurisdiction over nonresidents who may be held responsible for injuries or death caused by their automobiles. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**This section is constitutional** and valid. Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931); Wynn v. Robinson, 216 N.C. 347, 4 S.E.2d 884 (1939); Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

The fundamental requisites of due process are notice and opportunity to be heard, both of which are adequately provided for by this section. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

This section has been considered against a constitutional background and upheld as giving adequate notice to the defendant and as a reasonable exercise of jurisdiction. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

A state may, in the exercise of its police power, provide that a nonresident motorist using its highways shall be deemed to have appointed a state official his agent to receive service of process in any action growing out of such use, if the statute provides a proper method for notifying the defendant of such service. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

**Section Not Retroactive.** — This section, providing that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process, is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process thereunder in an action accruing before the effective force of the statute is void. Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930).

**Section Strictly Construed.** — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**A narrow interpretation of this section would defeat its purpose.** Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**But Strict Compliance Is Required.** — The provisions of this section are in derogation of the common law and must be strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

The provisions of this section are in derogation of the common law and must be strictly complied with to the extent that actual notice given in any manner other than that prescribed by the statute cannot supply constitutional validity to it or to service under it. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

**This section does not in any way change or amend the law governing the commencement of actions** or the contents of a summons. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

**It Provides Artificial Method of Serving Process.** — This section provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

**The issuance of a valid summons is necessary** for there to be compliance with the provisions of this section. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

**Commissioner of Motor Vehicles Does Not Have Authority to Accept Service As Attorney for a Nonresident Motorist; His Function Is Limited to Being the Recipient of Substitute Service of Process upon a Nonresident Motorist.** — See opinion of Attorney General to Mr. J.M. Penny, Department of Motor Vehicles, 41 N.C.A.G. 567 (1971).

**Either service under this section or under Rule 4(j)(9) is available** to serve a nonresident operator of a motor vehicle under appropriate circumstances. House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

**Since validity of this section does not make it exclusive.** House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

**Statutes in Pari Materia.** — Sections 20-22, 20-37, 20-38 and 20-78, dealing with the privilege and responsibilities of persons operating motor vehicles on the public highways of the State, and this section relating to service of process on a nonresident who has committed a tort in the operation of a vehicle on the public highways of the State, are dealing with the same subject matter and must be considered in pari materia. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

**This section and former § 1-89, relating to contents and return of summons, were to be construed together** and the provisions of both strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967). As to summons, see now Rule 4 of the Rules of Civil Procedure (§ 1A-1).

**Essential Meaning of This Section and § 20-71.1 the Same.** — Despite differences in the wording of this section and § 20-71.1, the essential meaning is the same. This section requires an affirmative finding as to agency, and § 20-71.1 establishes the rule that proof of ownership is prima facie evidence of such agency. Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

**Section Not in Conflict with § 1-21.** — This section and § 1-105.1, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal § 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243 (1976).

**This section does not warrant service upon a nonresident owner in an action for abuse of process** based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. Lindsay v. Short, 210 N.C. 287, 186 S.E. 239 (1936).

**Section Applies to Action on Judgment Entered in Another State.** — This section applies to an action against an alleged joint tort-feasor based upon judgments entered in courts of other states, arising from an accident in this State. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

**Nonresident wife living with her husband in another state may serve summons on him by service on Commissioner (now Secretary) of Revenue** in her action instituted in a county in this State, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940).

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State, service of process on defendant by service on the Commissioner (now Secretary) of Revenue under the provisions of this section is valid. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), rev'd on other grounds, 220 N.C. 648, 18 S.E.2d 162 (1942).

**Section 1-105.1 makes this section applicable to residents of the State who leave** and remain without the State subsequent to an accident. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Before the enactment of § 1-105.1, the method of serving process on a nonresident provided in this section and former § 1-106 was ineffective to obtain service of process on a citizen and resident of this State while such citizen was residing temporarily outside the State, or was in the armed services of the United States and stationed in another state or foreign country. Foster v. Holt, 237 N.C. 495, 75 S.E.2d 319 (1953).

**To sustain service of process upon defendant under this section and § 1-105.1, the plaintiffs must show one of two circumstances;** Either: (1) That defendant had established a residence outside the State subsequent to the accident or collision, or (2) that he had left the State subsequent to the collision complained of and remained absent from the State for sixty days or more continuously. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Residence of defendant at time of accident controlled** the application of this section, § 1-105.1 and former § 1-107 under federal Rule 4 (d) 7. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

**Service Defective without Affidavits of Compliance.** — Without the affidavits of compliance and other documents required by subdivision (3), service of process is defective. Ridge v. Wright, 29 N.C. App. 609, 225 S.E.2d 131 (1976).

**Affidavit Insufficient to Support Service under this Section and § 1-105.1.** — Where plaintiffs' affidavits, stripped of incompetent evidence, are left with the statement of the deputy sheriff that he went to defendant's last-known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former § 1-98.2, it is insufficient to make out a prima facie case to support service of process under this section and § 1-105.1. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Resident of Canada Is "Nonresident".** — A resident of Canada, operator of an automobile involved in an accident on a public highway in this State, is a "nonresident" within the purview of this section. Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

**Member of Armed Services Stationed Here under Military Orders.** — The evidence tended to show that a member of the armed services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons both had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, is held sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to service of summons under this section. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

**1953 Amendment Authorized Service on Personal Representative of Deceased Nonresident.** — The 1953 amendment to this section authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

Before the 1953 amendment, this section made no provision for service on the personal representative of a deceased automobile owner who died after an accident occurring in this State and before service of process, and service under the statute upon such personal representative conferred no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935).

This section clearly permits nonresident administrators to be sued in the State, in actions "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle [anywhere within the State]." Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

For comment on the 1953 amendment, see 31 N.C.L. Rev. 395.

**Purpose and Scope of 1953 Amendment.** — Except for changes in respect of the manner of service, it seems clear that the authorization of an action and service of process upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles was the only purpose and significant effect of the 1953 amendment. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

**The overwhelming weight of authority sustains the assertion of jurisdiction over personal representatives** of nonresident motorists. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

While North Carolina, by virtue of this section, permits a suit against the nonresident administrator of a motorist who became involved in an auto accident in North Carolina, nonresident administrators are otherwise held to lack the capacity to sue or be sued. However, the argument that the lack of capacity to initiate suit, while having capacity to be sued, renders a statute like this section "grossly unfair" has been specifically rejected. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

**Counterclaim by Personal Representative.** — Once a federal district court properly exercises jurisdiction to determine a cause of action, such procedural matters as the assertion of counterclaims should be governed by the specific federal rules pertaining thereto without further reference to state law. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969), holding that the federal district court correctly decided that a foreign personal representative could assert a counterclaim in an action in that court wherein service was had under this section.

**An action authorized by this section as amended in 1953 is an exception to the general rule** stated in Cannon v. Cannon, 228 N.C. 211, 45 S.E.2d 34 (1947). Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

**Public Highways Include Public Streets.** — When the legislature authorized the service of process on a nonresident in an action for damages growing out of an accident occurring on the public highways of North Carolina, it covered accidents on public streets as well as public roads, for both are public highways. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

**The legislature, in the 1955 amendment, intended only to broaden the area of vehicular operation to include private ways** and places on land not within the confines of public highways. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 530.

**It did not intend to enlarge and extend the meaning of the words "motor vehicle."** The 1955 amendment does not undertake to change the type of vehicle, but merely enlarges the sphere of its operation. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

**Which Involves Only Motor-Driven Devices Used in Travel by Land.** — The ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

**An airplane is not a "motor vehicle"** within the purview of this section. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

**State May Assert Jurisdiction over Owner as Well as Driver.** — The State has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the State's interest; it is not pushing the matter too far to recognize that the State may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the State's highways. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**But Neither Ownership nor Physical Presence Is Necessary.** — By the express language of this section, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958).

Under this section, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence insofar as his amenability to constructive service of process is concerned. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

**Car Must Be Operated by, for or under Direction or Control of Nonresident Defendant.** — This section provides for constructive service of process upon a nonresident defendant in either of the following situations: 1. Where the nonresident was personally operating the vehicle. 2. Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

To sustain service of process under this section there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control or direction." Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. Smith v. Haughton, 206 N.C. 587, 174 S.E. 506 (1934); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate employer, supports the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section and, in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner (now Secretary) of Revenue is valid. Wynn v. Robinson, 216 N.C. 347, 4 S.E.2d 884 (1939). See also, Queen City Coach Co. v. Chattanooga Medicine Co., 220 N.C. 442, 17 S.E.2d 478 (1941).

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, is sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner (now Secretary) of Revenue. Crabtree v. Burroughs-White Chevrolet Sales Co., 217 N.C. 587, 9 S.E.2d 23 (1940).

Where a deputy sheriff of the state of South Carolina was traveling through this State to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner, it was held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the Commissioner (now Secretary) of Revenue was void. Blake v. Allen, 221 N.C. 445, 20 S.E.2d 552 (1942).

Evidence was sufficient to show control of the motor vehicle by the nonresident defendant. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

**Owner May Be Presumed to Have Right of Control.** — An automobile owner may not unreasonably be presumed to have a right to exercise control. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**And Unlikelihood That He Will Exercise It Is Immaterial.** — The unlikelihood that the owner will in fact exercise his legal right to control the operation of the automobile is immaterial. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**Owner Need Not Be Physically in a Position to Direct Driver.** — This section does not require that the owner be physically in a position to direct the driver's every move. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**The words "express or implied" suggest only a minimal connection between the driver and the owner,** which is satisfied if the owner has a legal right to control the operation of the automobile. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**Driver Need Not Be Acting for Pecuniary Benefit of Owner.** — This section does not require that the driver be acting for the pecuniary benefit of the owner. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**The "family purpose" doctrine is not determinative** in interpreting this section where "control or direction" are the standards. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

**Family-Purpose Automobile Operated by Son of Owner.** — A family-purpose automobile, owned by a resident of Canada, and operated by her son on a public highway in this State, is operated for the owner, or under her control or direction, express or implied, within the purview of this section. Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

**The summons must command the sheriff or other proper officer to summon the defendant or defendants.** Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Where the summons commanded the sheriff to summons the Commissioner of Motor Vehicles only and did not command the sheriff to summons the defendants at all and the Commissioner duly mailed a copy to the nonresident defendants, the nonresidents were not summoned and the court had no jurisdiction in the absence of a general appearance by them. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

**Summons Held Defective Where Directed to Commissioner, not Defendants.** — A summons was held patently defective when it was directed not to the nonresident defendants as required by § 1A-1, Rule 4(c) but instead to the Commissioner of Motor Vehicles, who was summoned and notified to appear and answer the complaint. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

**Meaning of Subdivision (2).** — The provision in subdivision (2) of this section making the defendant's return receipt "sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant," does not mean that all that is required to effect service upon a nonresident motorist is the return of a receipt for registered mail signed by the defendant. This provision did not replace the statutory scheme for substituted service; rather, it merely provided a conclusive means of determining when that service had been accomplished. Service is still to be made "by leaving" the process with the Commissioner of Motor Vehicles. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

Hence, where, apparently through inadvertence, the order for service of process upon a nonresident motorist under this section was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail as required by subdivision (2) of this section. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

**Service on Commissioner Must Be by Sheriff of Wake County or Some Other Person Duly Authorized by Law to Serve Summons and Commissioner May Not Accept Service by Mail or Directly.** — See opinion of Attorney General to Mr. J.M. Penny, Assistant Commissioner of Motor Vehicles, 42 N.C.A.G. 110 (1972).

**What Sheriff's Return Must Show.** — When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. Propst v. Hughes Trucking Co., 223 N.C. 490, 27 S.E.2d 152 (1943).

**Refusal to Accept Registered Mail.** — A default judgment will not be vacated where nonresident defendants knew plaintiff was injured by a truck owned and operated by them, and was demanding damages, and they refused to accept registered mail in order to avoid service. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

**Service under Federal Rule.** — If the requirements of this section and § 1-105.1 are met, service under Rule 4 of the federal Rules of Civil Procedure is valid. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

**Amendment of Process and Pleading.** — When the procedural requirements of this section are strictly complied with, the process and pleading are subject to amendment in accordance with general rules. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Where service of process on a nonresident motorist is had in strict accordance with the procedural requirements of this section, such process and the pleading is subject to amendment in accordance with the general rules. Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951).

**Procedural Error Corrected When Another Summons Served and Returned.** — If the initial service failed to comply with this section, the procedural error is corrected when another summons, dated subsequently, is served and returned as having been served on defendant by leaving a copy with the Commissioner of Motor Vehicles as process agent for defendant. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

**Service Held Sufficient.** — Where the person sought to be sued, personally receives notice by registered mail of summons and complaint giving him unmistakable notice that it was he that was intended to be sued, although the process ran against a nonexistent corporation of the same name as the firm operated by him, it was held that the service in strict accord with this section is sufficient to meet the requirements of due process of law. Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951).

Where defendant refused to accept a copy of the complaint and summons, because the word "Jr." was not included after his name, the Supreme Court held that the suffix, "Jr.," is no part of a person's name; it is a mere descriptio personae; names are to designate persons, and where the identity is certain a variance in the name is immaterial. Sink v. Schafer, 266 N.C. 347, 145 S.E.2d 860 (1966).

**Motion to Quash Service Denied.** — Where, in an action against a nonresident bus owner to recover for the negligent operation of a bus in this State, service on the nonresident was had by service on the Commissioner of Motor Vehicles, the nonresident's motion to quash the service should be denied when the nonresident offered no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right. Israel v. Baltimore & A.R.R., 262 N.C. 83, 136 S.E.2d 248 (1964).

**Extension of Time to Plead.** — The statutes pertaining to service of process upon a nonresident motorist contemplate giving such a defendant an opportunity to defend even beyond the right of the judge in his discretion to extend the time. Mills v. McCuen, 1 N.C. App. 403, 161 S.E.2d 628 (1968).

There is no error where the judge not only found good cause for extending the time to plead on behalf of the defendant but allowed the extension in his discretion, no abuse of discretion has been shown, and there was sufficient evidence below to support the court's finding of sufficient cause. Mills v. McCuen, 1 N.C. App. 403, 161 S.E.2d 628 (1968).

**Finding of Nonresidence Conclusive on Appeal.** — The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under this section, is conclusive on appeal if such finding is supported by evidence. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931).

**Findings of Fact Sufficient to Support Service under This Section.** — See Winborne v. Stokes, 238 N.C. 414, 78 S.E.2d 171 (1953).

**Applied** in MacClure v. Accident & Cas. Ins. Co., 229 N.C. 305, 49 S.E.2d 742 (1948); Todd v. Thomas, 202 F. Supp. 45 (E.D.N.C. 1962); Lamb v. McKibbon, 15 N.C. App. 229, 189 S.E.2d 547 (1972).

**Quoted** in Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

**Cited** in Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937); Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Ellington v. Milne, 14 F.R.D. 241 (E.D.N.C. 1953).

**§ 1-105.1. Service on residents who establish residence outside the State and on residents who depart from the State.** — The provisions of G.S. 1-105 of this Chapter shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for 60 days or more, continuously whether such absence is intended to be temporary or permanent. (1955, c. 232; 1967, c. 954, s. 4; 1971, c. 420, s. 2.)

**Cross Reference.** — See note to § 1-105.

**Editor's Note.** — This section was repealed, effective Jan. 1, 1970, by Session Laws 1967, c. 954, s. 4.

Session Laws 1971, c. 420, s. 1, effective July 1, 1971, provides: "Section 4 of Chapter 954 of the 1967 Session Laws is hereby amended by deleting G.S. 1-105 and G.S. 1-105.1 from the list of repealed General Statutes sections."

**Section Strictly Construed.** — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Section Not in Conflict with § 1-21.** — This section and § 1-105, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal § 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243 (1976).

**Domicile in State Brings Defendant within Reach of State's Jurisdiction.** — Domicile in the State is alone sufficient to bring an absent defendant within the reach of the State's jurisdiction for purposes of a personal judgment by means of appropriate substituted service, provided proper notice and opportunity for hearing were given. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

**When Plaintiff Must Show Facts Bringing Defendant within Purview of Section.** — This section does not require that plaintiffs must set forth in their complaint or by affidavit the facts giving rise to the conclusion that defendant comes within the purview of the statute; nevertheless, upon attack by special appearance and motion to quash, a showing is required of the facts essential to jurisdiction. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Upon the defendant's motion to quash the service and dismiss the action, it becomes incumbent upon plaintiffs to present evidence to support the service of process. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Mere Averment of Due Diligence Is Insufficient.** — A mere averment of due diligence sufficient to support service by publication in an in rem action is not sufficient if the case arises under this section. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Where plaintiffs' affidavits, stripped of incompetent evidence, are left with the statement of the deputy sheriff that he went to defendant's last known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former § 1-98.2, it is insufficient to make out a prima facie case to support service of process under this section and § 1-105. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Averment and Affidavit Based on Hearsay.** — Where one plaintiff simply averred that he was "informed and believed" that defendant had removed himself from his last known address and had left the State and remained absent for more than sixty days continuously subsequent to the collision complained of and was residing somewhere in Florida and the deputy sheriff's affidavit averred that he talked with a woman who he "was informed" and believed was defendant's sister who told him that it was her "information and belief" that defendant was living in Florida and that he was "informed and believes and therefore says" that the only information he was able to obtain concerning the whereabouts of defendant indicated that the said defendant was residing in the state of Florida, address unknown, this evidence is manifestly hearsay evidence, not admissible, and defendant's objection thereto is entirely proper. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Service on Commissioner Must Be by Sheriff of Wake County or Some Other Person Duly Authorized by Law to Serve Summons and Commissioner May Not Accept Service by Mail or Directly.** — See opinion of Attorney General to Mr. J.M. Penny, Assistant Commissioner of Motor Vehicles, 42 N.C.A.G. 110 (1972).

**Cited** in Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

## ARTICLE 9.

## *Prosecution Bonds.*

**§ 1-109. Plaintiff's, for costs.** — At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(3) File with him a written authority from a superior or district court judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R. C., c. 31, s. 40; C. C. P., s. 71; Code, s. 209; Rev., s. 450; C. S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989; 1971, c. 268, s. 3.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "superior or district court" near the beginning of subdivision (3).

Only the opening paragraph of the section and the subdivision changed by the amendment are set out.

For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

**§ 1-110. Suit as a pauper; counsel.** — Any superior or district court judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the provisions of G.S. 1-109. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (C. C. P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C. S., s. 494; 1971, c. 268, s. 4.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "superior or district court" near the beginning of the first sentence and substituted, at the end of that sentence, "provisions of G.S. 1-109" for "preceding section [§ 1-109]."

For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

**Person May Institute Special Proceeding in Forma Pauperis.** — See opinion of Attorney General to Mrs. Daphene L. Cantrell, Assistant Clerk, Superior Court, Mecklenburg County, 44 N.C.A.G. 147 (1974).

### § 1-111. Defendant's, for costs and damages in actions for land.

**Editor's Note.** — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

**The defense bond required by this section is not an "appeal bond"** but is a bond which can be required before defendant is allowed to plead to the complaint. Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

**Failure to Give Undertaking — When No Objection Made.** —

In cases coming within the purview of this section, when an answer has been filed without any bond and has remained on file without objection, it would be improper for the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving the defendant the opportunity to file a defense bond. Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

**Failure to Give Undertaking — Waiver.** — The requirement that the defendant must execute and file a defense bond may be waived, unless seasonably insisted upon by the plaintiff. Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

**Applied** in Turner v. Weber, 16 N.C. App. 574, 192 S.E.2d 601 (1972).

### § 1-112. Defense without bond.

**Editor's Note.** —

For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

**Applied** in Turner v. Weber, 16 N.C. App. 574, 192 S.E.2d 601 (1972).

## ARTICLE 11.

## *Lis Pendens.*

### § 1-116. Filing of notice of suit.

**In General.** —

The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

**Purpose of 1959 Amendment of Section.** — See Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

**This section specifies the actions in which constructive notice is required,** including actions affecting title to real property, and also prescribed the contents of the required notice and when it may be filed. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

**Action for Monetary Damages, etc.** — In accord with 2nd paragraph in original. See Lord v. Jeffreys, 22 N.C. App. 13, 205 S.E.2d 563 (1974).

**Applied** in Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975).

## § 1-117. Cross-index of lis pendens.

**Effect of Lis Pendens Statutes.** — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

**Persons Affected by Doctrine of Lis Pendens.** — The doctrine of lis pendens only affects third persons who may take title after complaint is filed and notice of lis pendens is filed and cross-indexed in the Record of Lis Pendens. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

**This section deals only with constructive notice.** Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Where a third party buys from defendant with actual notice or knowledge of the suit and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors'. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

## § 1-118. Effect on subsequent purchasers.

**Effect of Lis Pendens Statutes.** — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

**Purchase from Litigant with Notice.** — The doctrine of lis pendens in this State only affects third persons who may take title after complaint is filed and notice of lis pendens is filed and cross-indexed in the Record of Lis Pendens. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

**This section only purports to deal with constructive notice** and its effect on subsequent purchasers. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Where a third party buys from defendant with actual notice or knowledge of the suit and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors'. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

## § 1-119. Notice void unless action prosecuted.

**Effect of Lis Pendens Statutes.** — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

## § 1-120. Cancellation of notice.

**Effect of Lis Pendens Statutes.** — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

# SUBCHAPTER VI. PLEADINGS.

## ARTICLE 15.

## *Answer.*

## § 1-139. Burden of proof of contributory negligence.

**Contributory Negligence Must Be Set Up in Answer and Proved.** — In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and defendant must assume the burden of proving his allegation of contributory negligence. Stith v. Perdue, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. Tharpe v. Brewer, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

**Sufficiency of Plea.** — To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. Tharpe v. Brewer, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

**A motion for judgment of compulsory nonsuit upon the ground of contributory negligence** should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. Stith v. Perdue, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

**Quoted** in Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

## ARTICLE 17.

## *Pleadings, General Provisions.*

**§ 1-148. Verification before what officer.** — Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; 1891, c. 140; Rev., s. 492; C. S., s. 532; 1971, c. 268, s. 5.)

**Editor's Note.** —

The 1971 amendment, effective July 1, 1971, substituted "General Court of Justice" for "superior court" and "magistrate" for "justice of the peace."

**Insufficient Basis to Impeach Verification.** — See Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C.726, 224 S.E.2d 674 (1976).

## SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

### ARTICLE 19.

### *Trial.*

**§ 1-174. Issues of fact before the clerk.** — All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding session, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C. S., s. 558; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

**§ 1-180:** Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

**Cross References.**

For statute prohibiting expression of opinion by judge, effective July 1, 1978, see § 15A-1222. For statute as to jury instructions, and explanation of law by judge, prohibiting judge's expression of opinion whether fact has been proved, effective July 1, 1978, see § 15A-1232.

**I. IN GENERAL.**

**Editor's Note.** —

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

For comment on North Carolina jury charge, present practice and future proposals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

For note on judges' remarks in the absence of a jury as a violation of this section, see 13 Wake Forest L. Rev. 259 (1977).

**Purpose of Section.** —

In accord with 2nd paragraph in original. See State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

Recognizing the threat posed to an unbiased consideration of the evidence by the weight and credence inevitably accorded by the jury to their perception of the trial judge's opinion of the case, the legislature very early provided a statutory safeguard which is currently embodied in this section. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

**This section imposes a duty of absolute impartiality on the trial judge.** State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972); State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

**This section is now applicable only to criminal cases.** Civil cases are governed by Rule 51 (a) of the Rules of Civil Procedure (§ 1A-1), which incorporates the substance of the section. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

**Strict Observance of Section's Provisions Required.** — The Supreme Court of North Carolina has consistently endeavored to maintain the integrity of this section by requiring strict observance of its provisions. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

**The provisions of this section, etc.** —

In accord with original. See State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

This section is mandatory and a violation of it is prejudicial error. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

**If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury** under the law and the evidence presented. Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1970).

**Section Not Applicable to Hearing Where No Jury Is Present.** — The provisions of this section prohibiting a court from giving an opinion on the evidence in the presence of the jury are obviously not applicable in a hearing where no jury is present. State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

The provisions of this section prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

**Applied** in State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970); Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969); State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969); State v. Blackmon, 6 N.C. App. 66, 169 S.E.2d 472 (1969); State v. Lightsey, 6 N.C. App. 745, 171 S.E.2d 27 (1969); State v. Ealy, 7 N.C. App. 42, 171 S.E.2d 24 (1969); State v. Locklear, 7 N.C. App. 493, 172 S.E.2d 924 (1970); State v. Barker, 8 N.C. App. 311, 174 S.E.2d 88 (1970); State v. Locklear, 8 N.C. App. 535, 174 S.E.2d 641 (1970); State v. Batts, 8 N.C. App. 551, 174 S.E.2d 704 (1970); State v. Korn, 10 N.C. App. 187, 178 S.E.2d 9 (1970); State v. Council, 10 N.C. App. 190, 177 S.E.2d 738 (1970); State v. Colson, 11 N.C. App. 436, 181 S.E.2d 210 (1971); State v. Powell, 277 N.C. 672, 178 S.E.2d 417 (1971); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Williams, 279 N.C. 515, 184 S.E.2d 282 (1971); State v. Shutt, 279 N.C. 689, 185 S.E.2d 206 (1971); State v. Gordon, 12 N.C. App. 38, 182 S.E.2d 14 (1971); State v. King, 12 N.C. App. 568, 183 S.E.2d 857 (1971); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972); State v. Phifer, 17 N.C. App. 101, 193 S.E.2d 413 (1972); State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972); State v. Black, 283 N.C. 344, 196 S.E.2d 225 (1973); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Woodcock, 17 N.C. App. 242, 193 S.E.2d 759 (1973); State v. Tennyson, 17 N.C. App. 349, 194 S.E.2d 224 (1973); State v. Wood, 17 N.C. App. 352, 194 S.E.2d 205 (1973); Jones v. Seagroves, 17 N.C. App. 467, 195 S.E.2d 35 (1973); State v. Wright, 18 N.C. App. 76, 195 S.E.2d 801 (1973); State v. Snuggs, 18 N.C. App. 226, 196 S.E.2d 525 (1973); State v. Mize, 19 N.C. App. 663, 199 S.E.2d 729 (1973); State v. Berry, 24 N.C. App. 312, 210 S.E.2d 494 (1974); State v. Lowery, 286 N.C. 698, 213 S.E.2d 255 (1975); State v. Gordon, 287 N.C. 118, 213 S.E.2d 708 (1975); State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975); State v. King, 287 N.C. 645, 215 S.E.2d 540 (1975); State v. Kelly, 24 N.C. App. 670, 211 S.E.2d 854 (1975); State v. Davis, 24 N.C. App. 683, 211 S.E.2d 849 (1975); State v. Bledsoe, 25 N.C. App. 32, 212 S.E.2d 232 (1975); State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975); State v. Davis, 25 N.C. App. 385, 213 S.E.2d 431 (1975); State v. Shaw, 26 N.C. App. 154, 215 S.E.2d 390 (1975); State v. Moore, 26 N.C. App. 193, 215 S.E.2d 171 (1975); State v. Norris, 26 N.C. App. 259, 215 S.E.2d 875 (1975); State v. Pettice, 26 N.C. App. 272, 215 S.E.2d 847 (1975); State v. Smith, 26 N.C. App. 283, 215 S.E.2d 830 (1975); State v. McLoud, 26 N.C. App. 297, 215 S.E.2d 872 (1975); State v. Medley, 26 N.C. App. 331, 215 S.E.2d 869 (1975); State v. Jones, 26 N.C. App. 467, 216 S.E.2d 387 (1975); State v. Battle, 26 N.C. App. 478, 216 S.E.2d 458 (1975); State v. Maddox, 27 N.C. App. 58, 217 S.E.2d 765 (1975); State v. Tomlim, 27 N.C. App. 68, 217 S.E.2d 755 (1975); State v. Moore, 27 N.C. App. 284, 218 S.E.2d 499 (1975); State v. Caldwell, 27 N.C. App. 323, 219 S.E.2d 235 (1975); State v. Abrams, 27 N.C. App. 627, 219 S.E.2d 823 (1975); State v. Sligh, 27 N.C. App. 668, 219 S.E.2d 801 (1975); State v. Bunton, 27 N.C. App. 704, 220 S.E.2d 354 (1975); State v. McNeil, 28 N.C. App. 125, 220 S.E.2d 401 (1975); State v. Buchanan, 28 N.C. App. 163, 220 S.E.2d 207 (1975); State v. Johnson, 28 N.C. App. 166, 220 S.E.2d 632 (1975); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976); State v. Wright, 28 N.C. App. 481, 221 S.E.2d 745 (1976); State v. Hunt, 28 N.C. App. 486, 221 S.E.2d 720 (1976); State v. Martin, 30 N.C. App. 512, 227 S.E.2d 172 (1976); State v. Chandler, 30 N.C. App. 646, 228 S.E.2d 69 (1976); State v. Small, 31 N.C. App. 556, 230 S.E.2d 425 (1976); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977); State v. Fisher, 32 N.C. App. 722, 233 S.E.2d 634 (1977); State v. Reese, 33 N.C. App. 89, 234 S.E.2d 41 (1977).

**Quoted** in State v. Jacobs, 278 N.C. 693, 180 S.E.2d 832 (1971); State v. Melvin, 32 N.C. App. 772, 233 S.E.2d 636 (1977).

**Stated** in State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

**Cited** in State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970); State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971); Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971); State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973); State v. Patterson, 284 N.C. 190, 200 S.E.2d 16 (1973); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Jones, 21 N.C. App. 666, 205 S.E.2d 147 (1974); State v. Harding, 22 N.C. App. 66, 205 S.E.2d 544 (1974); State v. Sturdivant, 26 N.C. App. 533, 216 S.E.2d 378 (1975); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976); State v. Walker, 28 N.C. App. 389, 221 S.E.2d 387 (1976); State v. Chester, 30 N.C. App. 224, 226 S.E.2d 524 (1976); State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977).

## II. OPINION OF JUDGE.

### A. General Consideration.

**Purposes and Effect of Section. —**

In accord with 2nd paragraph in original. See State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

In accord with 5th paragraph in original. See State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973); State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

In accord with 9th paragraph in original. See State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

Defendants are entitled to have a case presented to the jurors without their being subjected to the opinion of a trial judge upon what the facts of the case are or what the verdict should be. Voorhees v. Guthrie, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

A court's expressions of opinion are particularly harmful if they include assumptions of evidence entirely unsupported by the record. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

When remarks from the bench tend to belittle and humiliate counsel, defendant's case can be seriously prejudiced in the eyes of the jury. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

Any opinion or intimation of the judge at any time during the trial which prejudices a litigant in the eyes of the jury is reversible error. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L.Ed.2d 861 (1971).

This section imposes on the trial judge the duty of absolute impartiality. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

It is the duty of the trial judge at all times to be absolutely impartial. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L.Ed.2d 861 (1971).

Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. To accord this right the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Every person charged with a crime has a right to trial before an impartial judge and an unprejudiced jury, and any intimation or expressed opinion by the judge at any time during the trial which prejudices the jury against the accused is ground for a new trial. State v. Arnold, 284 N.C. 41, 199 S.E.2d 423 (1973).

**This section was intended, etc. —**

The respective functions of the judge and jury in criminal trials are clearly demarcated by this section; by that demarcation the trial judge is denied the right, in any manner or in any form, to invade the province of the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

**Judge to Abstain from Prejudicial Conduct or Language.** — The judge must abstain from conduct or language which tends to prejudice the accused or his cause with the jury. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L.Ed.2d 861 (1971).

**This section forbids the judge, etc. —**

In accord with 1st paragraph in original. See State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L.Ed.2d 861 (1971); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); State v. Hewitt, 19 N.C. App. 663, 199 S.E.2d 729 (1973); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

In accord with 2nd paragraph in original. See State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

In accord with 8th paragraph in original. See State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

This section forbids any intimation of the trial judge's opinion in any form whatsoever. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

The trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

The judge may not make a statement or ask a defendant or a witness questions tending to impeach him or to cast doubt on his credibility or which intimate that a fact has or has not been established. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

**Section Not Confined to Charge. —**

In accord with 3rd paragraph in original. See State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

This section applies not only to the charge of the court, but also prohibits the court at a jury trial from expressing an opinion on the evidence or the veracity of the witnesses at any time during the trial in any manner, or in any form, by word of mouth or by action, and prohibits the trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

It is error for the trial judge to express or imply, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of any witness. It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

**Section Applies throughout Trial. —**

In accord with 1st paragraph in original. See State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

In accord with 2nd paragraph in original. See State v. Lewis, 32 N.C. App. 471, 232 S.E.2d 472 (1977).

This section has been interpreted to forbid the judge's expression of an opinion before the jury at every stage of the trial process. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

This section has been construed to prohibit any opinion or intimation of the judge at any time during the trial which is calculated to prejudice the parties in the eyes of the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

While referring explicitly only to the charge, this section has always been interpreted to forbid the expression of any opinion or even an intimation by the judge, at any time during the course of the trial, which might be calculated to prejudice either party. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

**But this section relates only to expressions of opinion during trial of case.** State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

**The trial of a case begins, etc. —**

In accord with original. See State v. Dark, 22 N.C. App. 566, 207 S.E.2d 290, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

**Motive of Judge Immaterial. —**

In accord with 1st paragraph in original. See State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

In accord with 2nd paragraph in original. See State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

The trial judge occupies an exalted station, causing jurors to entertain great respect for his opinion and to be easily influenced by a suggestion coming from him. The probable effect upon the jury, and not the motive of the judge, determines whether a party's right to a fair trial has been impaired. In re Will of York, 18 N.C. App. 425, 197 S.E.2d 19, cert. denied, 283 N.C. 753, 198 S.E.2d 729 (1973).

The effect on the jury of the remark and not the judge's motive in making it is determinative. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

**Inadvertent Expression, etc. —**

The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

Where trial court inadvertently expressed its opinion in stating the contentions of the parties, the cause must be remanded for a new trial. Voorhees v. Guthrie, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

**Prejudicial Impression Not Removed, etc. —**

Once the trial judge expresses an opinion as to the facts before the jury, the resulting prejudice to the defendant is virtually impossible to cure. The prejudice is not removed by the judge's instructing the jury not to consider the remarks. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

Error committed by the court in expressing an opinion on the facts is virtually impossible to cure. State v. Clanton, 20 N.C. App. 275, 201 S.E.2d 365 (1973).

Ordinarily, an expression of opinion cannot be cured by instructing the jury to disregard it. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

**Harmless Error. —**

In accord with original. See State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1970); State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972); State v. Wooten, 15 N.C. App. 193, 189 S.E.2d 579, appeal dismissed, 281 N.C. 763, 191 S.E.2d 360 (1972).

Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973).

Although the language used in an instruction was a poor choice for the purpose intended and was expressly disapproved and would ordinarily require a new trial, it did not constitute reversible error because it had no prejudicial effect on the result of the trial and was therefore harmless. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L.Ed.2d 218 (1972).

A defendant who contends that the trial court's remarks amount to an expression of opinion in the presence of the jury must show more than the possibility of unfair influence; it must appear with ordinary certainty that the court's language, when fairly interpreted, was likely to convey an opinion to the jury and could reasonably have had an appreciable effect on the result of the trial. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974).

**Weight and Sufficiency of Evidence, etc. —**

The weight and credibility of the evidence must be left strictly to the jury. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

**Objections Must Be Made in Apt Time. —**

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973).

A slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975); State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

An inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

An inadvertence in recapitulating the evidence must be called to the trial court's attention in time for correction and will not be held reversible error when this is not done. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

**But instruction containing statement of material fact not shown in evidence must be held prejudicial,** even though not called to the court's attention at the time. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

**Unsupported Assumption of Evidence Is Prejudicial Despite Untimely Objection. —** While ordinarily error in stating contentions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

**Credibility of Witnesses, etc. —**

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The credibility of witnesses, the weight and sufficiency of testimony, are matters peculiarly within the province of the jury to consider and pass upon. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

It is for the jury and not for the judge to say how the testimony of a witness is affected by other testimony. Williford v. Jackson, 29 N.C. App. 128, 223 S.E.2d 528 (1976).

The sound rule that no judge at any time is permitted to cast doubt upon the testimony of a witness is firmly fixed in this jurisdiction. The judge must exercise great care to see that nothing he does or says during the trial can be understood by the jury as an expression of an opinion on the facts or conveys an impression of judicial meaning. State v. Battle, 18 N.C. App. 256, 196 S.E.2d 536 (1973).

**The criterion for determining whether the trial judge deprived an accused of his right to a fair trial** by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969); State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971); State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

**A broadside exception to the charge will not be considered, etc. —**

Where the error assigned is that "the court erred in failing to declare and explain the law arising on the evidence given in the case," and that in so failing the court violated this section, such an assignment of error is a broadside exception and will not be considered on appeal. State v. Rigsbee, 15 N.C. App. 218, 189 S.E.2d 583 (1972).

**Correctness of Instructions Will Be Presumed. —**

When the charge is not included in a case on appeal, it is presumed to be free from error and also it is presumed that the jury was properly instructed as to the law arising upon the evidence. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

### B. What Constitutes an Opinion.

**In General. —**

The judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Blue, 17 N.C. App. 526, 195 S.E.2d 104 (1973).

**Test of Violation. —**

The provisions of this section may be violated at any stage of the trial by comments of the testimony of a witness, by remarks which tend to discredit a witness, by imbalancing the evidence in the charge to the jury or by any other means which intimates an opinion of the trial judge in a manner which would deprive an accused of a fair and impartial trial before the jury. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

An expression of opinion prohibited by this section occurs when the judge's remarks imbalance the evidence in a manner which deprives the accused of a fair and impartial trial. State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977).

The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

**Direct Language Not Necessary, etc. —**

In accord with 1st paragraph in original. See State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

In accord with 5th paragraph in original. See State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

Even if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice. If so, a new trial must be allowed. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

**Taking Witness into Custody in Presence of Jury. —**

If a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

**Taking Witness into Custody Out of Presence of Jury.** — The fact that the trial court ordered a State's witness to be taken into custody and charged with perjury does not constitute an expression of opinion to the prejudice of defendants in violation of this section when the trial court's action took place out of the presence of the jury. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

**Taking Defendant into Custody during Course of Trial.** — There is no prejudicial error so long as the discretion of the trial judge to insure the presence of a defendant by ordering him into custody during the course of trial is not exercised in a manner which would convey to the jury, either expressly or implicitly, the slightest intimation that the court had any opinion regarding defendant's credibility as a witness or the strength of his case. State v. Collins, 19 N.C. App. 553, 199 S.E.2d 491 (1973), cert. denied, 285 N.C. 664, 207 S.E.2d 758 (1974).

**Possibility of Unfair Inference Insufficient.—**

It is not sufficient to show by a critical examination that the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

The bare possibility that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

**Remarks Belittling Counsel.** — Remarks from the bench which tend to belittle and humiliate counsel, or which suggest that counsel is not acting in good faith, reflect not only on counsel but on the defendant as well and may cause the jury to disbelieve all evidence adduced in defendant's behalf. State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972).

It is error for the judge to make any remarks which tend to belittle or humiliate defendant's cause or his counsel before the jury. State v. Hewitt, 19 N.C. App. 666, 199 S.E.2d 695 (1973).

While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

**Admonitions of the court to counsel upon improper questioning of witnesses** have repeatedly been held not prejudicial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

**A remark by the court in admitting or excluding evidence** is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

**Control of Examination and Cross-Examination.** — It is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination, but in doing so the court must not intimate any opinion either of the witness or his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

**Intimation That Controverted Facts, etc. —**

In accord with original. See State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

**Assumption That Fact, etc. —**

In accord with 1st paragraph in original. See State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971); State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970); State v. Cates, 24 N.C. App. 65, 210 S.E.2d 100 (1974).

**Remarks Must Be Prejudicial. —** Remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. Raynor, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he has been deprived of a fair trial by such remarks is upon the defendant. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

All expressions of opinion do not warrant a new trial. A remark made by the judge in the presence of the jury does not entitle defendant to a new trial if the statement, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. State v. Teasley, 31 N.C. App. 729, 230 S.E.2d 692 (1976).

**Credibility of Witnesses. —** This section prohibits any ridicule that casts aspersions on the testimony of a witness and thus damages his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is error for the trial judge to indicate to the jury in any manner his opinion as to the credibility of a witness, or as to the weight to be given his testimony. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 283 N.C. 99, 195 S.E.2d 33 (1973).

**Time Spent in Outlining Evidence, etc. —** The fact that the court necessarily consumes more time in stating the evidence for the State than in stating that of the defendant does not constitute an expression of opinion on the evidence. State v. Norman, 29 N.C. App. 606, 225 S.E.2d 141 (1976).

The fact that the trial court necessarily consumed more time in outlining the evidence for the State than that of the defendant did not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. State v. Crutchfield, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

The court summarized the evidence fairly and accurately showing no bias in favor of either the State or the defendants; the fact that more time was devoted to the State's evidence than to that of the defendants was to be expected where the State presented far more evidence. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

The charge of the court in summarizing the evidence for the jury was not weighed in favor of the State to such a degree that it constituted an expression of opinion. The State presented a great deal more evidence than the defendant and it is to be expected that more time would be required for summary. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

The fact that the court spent more time in summarizing the State's evidence than that of the defendant is attributable to the fact that the witnesses for the State testified more extensively than those of the defendant. State v. Payne, 19 N.C. App. 511, 199 S.E.2d 132 (1973).

The trial court may have emphasized discrepancies in defendant's evidence more than those in State's evidence, but the court is not required to give equal time to each side; nothing more is required than a clear instruction applying the law to the evidence and giving the positions taken by the parties as to the essential features of the case. State v. Reisch, 20 N.C. App. 481, 201 S.E.2d 577, cert. denied, 285 N.C. 88, 203 S.E.2d 61 (1974).

A mere disparity in the length of time devoted by a judge in stating contentions of parties does not constitute prejudicial error. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

The rule that a mere disparity in the length of time devoted by a judge in stating the contentions of the parties does not constitute prejudicial error particularly applies in cases where the number of witnesses presented by one side greatly exceeds the number presented by the other side. State v. Brandon, 24 N.C. App. 558, 211 S.E.2d 496 (1975).

**A charge which reviews the State's evidence** cannot be held erroneous as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury it was reviewing the State's evidence. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

**Sustained and systematic failure to rule upon objections** may indicate an opinion by the trial judge in violation of this section. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

**A statement of a valid contention based on competent evidence** is not error as being an expression of opinion. State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977).

**Questioning Witness. —** In accord with 4th paragraph in original. See State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971).

In accord with 6th paragraph in original. See State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, but the law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is proper for the court to ask a witness questions for the purpose of clarifying the witness' testimony, but in so doing the court should be careful not to express an opinion on the facts or impeach or discredit the witness. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

A trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716, cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Hood, 13 N.C. App. 170, 184 S.E.2d 916 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 926 (1972); State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514 (1972); State v. Wooten, 15 N.C. App. 193, 189 S.E.2d 579, appeal dismissed, 281 N.C. 763, 191 S.E.2d 360 (1972); State v. Wright, 16 N.C. App. 562, 192 S.E.2d 655 (1972), cert. denied, 282 N.C. 584, 493 S.E.2d 746 (1973); State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

It is proper, and often necessary, that judges ask questions of witnesses which are designed to obtain a proper understanding and clarification of the witnesses' testimony. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

A trial judge is justified in propounding competent questions in order to develop some relevant fact. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

It is not improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony as long as the trial judge does not engage in frequent interruptions and prolonged questioning. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the impression of judicial leaning, examinations of witnesses by the judge violate the purpose and intent of this section and constitute prejudicial error. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Wright, 16 N.C. App. 562, 192 S.E.2d 655 (1972), cert. denied, 282 N.C. 584, 493 S.E.2d 746 (1973).

The statutory proscription against the trial judge expressing an opinion prohibits the court from asking questions at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Huffman, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

The court can ask questions of the witness for the purpose of clarifying his testimony. State v. McLamb, 13 N.C. App. 705, 187 S.E.2d 458, cert. denied, 281 N.C. 316, 188 S.E.2d 899 (1972).

It is sometimes necessary for the purpose of clarification for a trial judge to question a witness, and such questions are proper so long as they are asked with care and in a manner which avoids prejudice to either party. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

It is improper for a trial judge to question a witness for the purpose of impeaching his testimony. State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971).

The trial judge is permitted to ask questions of a witness in the presence of a jury for the purpose of clarifying matters that are unclear or not understood. State v. Laws, 16 N.C. App. 129, 191 S.E.2d 416 (1972).

While this section prohibits the court from expressing an opinion as to what has or has not been shown by the testimony of a witness, it is not improper for the court to ask questions for the purpose of obtaining a proper clarification and understanding of the testimony. State v. Williams, 17 N.C. App. 31, 193 S.E.2d 478 (1972); State v. McMillan, 19 N.C. App. 721, 200 S.E.2d 339 (1973).

In the trial of criminal actions the court may ask a witness questions designed to obtain a proper understanding and clarification of the witness' testimony or to bring out some fact overlooked, but the court may not ask a defendant or a witness questions tending to impeach him or to cast doubt upon his credibility. State v. Pinkham, 18 N.C. App. 130, 196 S.E.2d 290 (1973); State v. Bond, 20 N.C. App. 128, 201 S.E.2d 71 (1973).

While this section prohibits the judge from expressing an opinion as to what has or has not been proven by the testimony of a witness, it is not improper, and is sometimes necessary, for the judge to ask questions of a witness in order to get the truth before the jury. State v. Coble, 20 N.C. App. 575, 202 S.E.2d 303, appeal dismissed, 285 N.C. 236, 204 S.E.2d 21 (1974).

In the exercise of his duty to supervise and control the course of a trial so as to insure justice for all parties, the court may interrogate a witness for the purpose of clarifying his testimony, and it is the duty of the trial judge to control the examination and cross-examination of witnesses. State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974).

While it is proper and may on occasion become necessary for the trial judge to interrogate a witness for the purpose of clarifying and promoting a better understanding of the witness's testimony, such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge, they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of this section and constitute prejudicial error. State v. Bridges, 19 N.C. App. 567, 199 S.E.2d 477 (1973).

The trial judge may not express an opinion to the jury in violation of this section by extensively questioning defendant and his witnesses. State v. Bond, 20 N.C. App. 128, 201 S.E.2d 71 (1973).

A trial judge may propound competent questions in order to clarify a witness' testimony. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

It is entirely proper, and often necessary, that the trial judge ask questions to clarify and promote a proper understanding of the testimony of the witnesses. In so doing, the trial judge expressed no opinion in violation of this section. State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976).

**Assumption of Existence, etc. —**

An instruction that there was evidence that defendant admitted some of the facts related to the crime was an assumption by the judge of a material fact which was not in evidence. It constituted an expression of opinion that a fact had been proven. State v. Clanton, 20 N.C. App. 275, 201 S.E.2d 365 (1973).

**Test for Determining Prejudice. —**

The question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970); State v. Raynor, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

When an objectionable opinion statement purportedly has been made and possibly violates this section, that remark, standing by itself, may not necessarily constitute reversible error. To establish reversible error, courts must consider the remark in the light of the circumstances under which it was made. State v. Rhodes, 28 N.C. App. 432, 221 S.E.2d 730, rev'd on other grounds, 290 N.C. 16, 224 S.E.2d 631 (1976).

Showing that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred is insufficient to show prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Statements of the judge must be considered in the context of the entire record, since the test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury. State v. Staley, 292 N.C. 160, 232 S.E.2d 680 (1977).

### C. Illustrative Cases.

### 1. Remarks Held Not Erroneous.

### a. Remarks concerning a Party to the Trial.

**Colloquy Whether Defendant Ought to Be Incarcerated Overnight.** — Colloquy between the trial court and the defense counsel in which the court stated, as the jury was leaving the courtroom, that the defendant ought to be kept in jail overnight, and in which the court also stated, in the absence of the jury, that the defendant "has got more reason to run now than he ever had," is not prejudicial. State v. Wood, 9 N.C. App. 706, 177 S.E.2d 449 (1970), cert. denied, 277 N.C. 459, 178 S.E.2d 226 (1971).

**Charge on Contention in Defendant's Confession.** — In a prosecution for breaking and entering and larceny, the trial court did not express an opinion on the evidence in charging on defendant's contention as contained in his confession that he acted only as a watchman during perpetration of the crimes where the court immediately thereafter instructed the jury that defendant denied being at the scene of the crime and claimed that his confession was made under duress. State v. McIlwain, 18 N.C. App. 230, 196 S.E.2d 614, cert. denied, 283 N.C. 668, 197 S.E.2d 877 (1973).

**Trial judge's admonition to defense counsel to refer to his client as defendant**, or by his full name rather than by his first name, was made in order to preserve the trial judge's conception of dignity and decorum in the courtroom, and did not constitute an opinion or partiality toward either defendant or the State. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

### b. Remarks concerning Witnesses.

**Ruling A Witness Expert.** — The ruling finding a witness to be an expert in his field could not have been understood by the jury as anything other than a ruling upon the qualification of the witness to testify as to his opinions. The general practice in the courts of this State has never been for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert, and therefore the judge did not express an opinion as to the credibility of this witness contrary to this section. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

The trial court did not express an opinion as to the credibility of witnesses for the State by ruling, in the presence of the jury, that each was an expert in the field of his testimony. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 283 N.C. 99, 195, S.E.2d 33 (1973).

Where the court's ruling could not be interpreted by the jury as anything other than a holding that the witness was qualified to testify concerning his expert opinion in his field, it was not necessary for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 283 N.C. 99, 195 S.E.2d 33 (1973).

**Remark That Witness' Motion for Directed Verdict Had Been Granted.** — A trial court's statement to the jury that motions for directed verdicts of not guilty had been entered by all four defendants and had been granted only as to two defendants, one of whom was about to testify for the other defendants, was not an expression of opinion. State v. Fry, 13 N.C. App. 39, 185 S.E.2d 256 (1971), appeal dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972).

**Remark That Witness Has Fully Answered Question.** —

Trial judge's statement that a question put to the witness had been previously answered did not amount to an expression of opinion on the evidence. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971).

The trial judge did not express an opinion in favor of the State by sustaining objections to defendants' questions and saying to defense counsel, "He has answered your question." This was not in any way a disparaging or critical remark but merely a statement of fact. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

**Judge's cautionary remark to a witness to prevent his implicating defendant in other crimes** was appropriate and in no way amounted to an expression of opinion on the evidence. State v. Roberts, 28 N.C. App. 194, 220 S.E.2d 627 (1975).

**Intimation that Witness Committed Perjury.** — Any intimation by the judge in the presence of the jury that a witness had committed perjury is a violation of this section and constitutes reversible error. State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

**Test with Regard to Perjury References.** — The principal determinative questions are whether acts or reference regarding perjury, by whomsoever made, have the effect either of stifling the free presentation of all the legitimate testimony available, or of preventing the unprejudiced consideration of all the testimony given, either of which may be sufficient to constitute reversible error. State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

### c. Remarks concerning Weight and Credibility of Testimony.

**Statement concerning Admission.** —

Where in the course of his charge to the jury a trial judge said: "I believe the State's evidence further tends to show that the defendant after being warned of his rights made an admission or confession to the police and told them that he had a gun; that is to wit: a .22 caliber pistol with a blue steel barrel and white handles," that was not an expression of opinion that defendant had confessed his guilt. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

**Testimony of Witnesses Having Interest in Case.** — There is no hard and fast form of expression or consecrated formula required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested. State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971).

A charge did not constitute an expression of opinion upon the credibility of defendant or his mother where the admonition to scrutinize their testimony in light of their interest in the case included not only the defendant and his mother but also the testimony of any witness who had an immediate personal interest in the outcome of the verdict. State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971).

It is proper for the trial court to instruct the jury to scrutinize the defendant's testimony in the light of his interest in the outcome of the case, and that if they believe he is telling the truth they will give to his testimony the same weight they would give to the testimony of any other believable witness. State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971), cert. denied, 280 N.C. 495, 486 S.E.2d 514 (1972).

**Definition of Reasonable Doubt.** — In a first-degree murder prosecution, the trial judge's definition of reasonable doubt as a "possibility of innocence" was more favorable to defendant than was required and therefore did not constitute prejudicial error. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

**Instruction That Jury May Consider "Absence of Provocation" for Murder.** — Judge's instruction to the jury in a first-degree murder case that the jury, in determining premeditation and deliberation, may consider the "absence of provocation" did not express a court opinion that there was no evidence of provocation in the case. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, — L. Ed. 2d — (1976).

**Use of Word "His" to Refer to All Witnesses.** — In a prosecution for kidnapping, where the trial judge charged the jury to scrutinize the testimony of interested witnesses, and the trial judge used the personal pronoun "his" to refer to the testimony of such witnesses, the charge does not constitute an expression of opinion upon the credibility of defendant in violation of this section since the admonition to scrutinize included not only the defendant but also the testimony "of any witness" whether male or female. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

### d. Miscellaneous Remarks.

**Questioning Witnesses.** — In a homicide prosecution, the trial court did not express an opinion in asking one State's witness 13 questions or in asking a second State's witness five questions, where each question was designed to clarify the testimony of the witness as to location of the defendant and the deceased at the time the homicide occurred. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

In a homicide prosecution, the trial court did not express an opinion in any of nine questions propounded to defendant where their purpose was to enable the court to rule upon objections by the solicitor, to clarify a simple, affirmative answer to a question asked in the alternative, to clarify defendant's ambiguous answers to questions by the solicitor concerning a prior conviction, or to enable the court to make an accurate note concerning defendant's testimony as to his reason for following deceased out of the poolroom where the homicide occurred. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

**Comment on Jury's Duty.** —

An instruction to the effect that the jury had a duty to reach a verdict "if you can do so without violence to your conscience" contains nothing that tends to coerce, nor any expression of opinion as to what the verdict should be. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Generally, where the jury have retired but are unable to reach a verdict, the court may call the jury back and instruct them as to their duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

It is the duty of the judge to counsel a perplexed jury towards an agreement, keeping always within the statutory restriction that he shall give no intimation on the merits or whether any fact has been fully and sufficiently proved. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

A statement made by the trial court that insofar as he knew all available evidence had been introduced was simply a statement that the court knew of no other evidence which would come up in a new trial, and that based upon the evidence it was the duty of the jury, if possible, to reach a verdict. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

The court may properly instruct the jury that the trial of the cause involves heavy expense to the county and that it is the duty of the jury to continue its deliberations and attempt to reach an agreement, but that the court is not attempting to force an agreement. State v. Brown, 280 N.C. 588, 187 S.E.2d 85, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972).

The trial judge correctly instructed the jury: "It is your duty to remember and consider all of the evidence whether called to your attention by counsel or the court or not, for all of the evidence is important." State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Where the jury, after some deliberation, returned to the courtroom without reaching a verdict and the trial judge at that time, inter alia, stated to the jury that the case was one of importance to the State and to the defendant, and some jury must pass upon it and that it was their duty to consider the evidence and not to decline to agree on account of stubbornness, such statements were allowed. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

When jurors, after deliberating only a short time, reported to the court that they were unable to agree, and the court twice simply asked them to continue their deliberations, the court being careful to point out that it did not want any juror to do anything against his conscience, the instruction that the jury try to reach a unanimous verdict neither intimated an opinion in violation of this section nor tended to coerce the jury to reach a verdict notwithstanding the conscientious convictions of any member. State v. Strickland, 21 N.C. App. 545, 204 S.E.2d 888 (1974).

**Comment upon Attitude and Conduct of Jurors.** — The trial judge's charge was allowed which said that the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance, and that it is rarely productive of good for a juror upon entering the jury room to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

**Apology for Having to Excuse Jury to Conduct Voir Dire Hearing.** — Where the jury was excused so that the court could conduct a voir dire hearing, and, shortly after the jury returned, it became necessary to excuse the jury again for the same reason, the trial court's statement, "Ladies and gentlemen, step into your room. I hate to bother you," was simply an apology for having to excuse the jury so soon after their return to the courtroom and did not tend to reflect an opinion that defendant's position was unsound and not worthy of the inconvenience being imposed upon the jury. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

**Informing Jury That Manslaughter Does Not Arise from Evidence.** — It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

**In a prosecution for kidnapping, use of the word "rape"** by the judge in a charge to the jury did not indicate an expression on the judge's part that such fact had been established where, in addition to the full and adequate curative instruction regarding the use of the word "rape," the jury was instructed elsewhere in the charge that "what the evidence does actually show is a question of fact for the jury's determination." Therefore, the charge when considered as a whole is free from prejudicial error. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

**Unqualified Use of "Assault" and "Rape".** — The charge, when read as a whole, did not show that the judge in any manner expressed any opinion in violation of this section by the unqualified use of the words "assault" and "rape" or "raping" in referring to the charges against the defendants and the use of these words, did not lead the jury to assume that the facts in controversy had been established. State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970), cert. denied, 401 U.S. 912, 91 S. Ct. 881, 27 L. Ed. 2d 812 (1971).

**Reading Warrant.** — In a drunken driving prosecution, the trial court did not express an opinion by the statement in the instructions that "the offense charged here was committed against the peace and dignity of the State" where the court was reading the warrant upon which the defendant was being tried. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

**Instruction as to Voluntary Flight of Defendant.** — The trial court's instruction that the voluntary flight of a defendant immediately after he is accused of a crime is not a circumstance sufficient in itself to establish his guilt, is not an expression of opinion, on the theory that the court implied to the jury that defendant had been formally charged with crime at the time of his flight from a deputy sheriff's car, when in fact the deputy had told defendant that he wanted to talk to him concerning a robbery. State v. Kirby, 7 N.C. App. 366, 172 S.E.2d 93 (1970).

**Reference to Deceased as Common-Law Husband.** — In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

**Inquiry as to Specific Amount of Damages Jury Intended to Award.** — Where the jury answered the issue of damages as "amount specified in contract," and the trial judge informed the jury that the verdict should be in some dollar amount and inquired if they intended the amount set forth in the complaint, and all members of the jury agreed to that amount, the judge did not suggest an answer in violation of this section. Roberts Co. v. Aladdin Knit Mills, Inc., 8 N.C. App. 612, 175 S.E.2d 289 (1970).

**Customary Rulings Sustaining Solicitor's Objections.** — A trial court did not express an opinion on the credibility or guilt of defendant in sustaining the solicitor's objections on 10 occasions to questions propounded to the defendant on direct examination, the ruling in each instance being the customary ruling, "Objection sustained," and the rulings being interspersed with six others overruling objections by the solicitor. State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972).

**Instruction That Whether Statement Was Oral or Written Made No Difference.** — In replying to the jury's question as to whether defendant's statement to the sheriff was oral or written, the trial court's instruction that, if the jury believed that such a statement was made, it would make no difference whether or not the statement was in writing, did not constitute an expression of opinion. State v. Crane, 11 N.C. App. 721, 182 S.E.2d 225 (1971).

**Use of Phrase "We Are Trying the Defendant".** — In a prosecution for armed robbery, where the judge's instruction to the jury included "Now, members of the jury, in the case in which we are trying the defendant . . .," the use of the word "we" was proper and did not convey to the jury that the trial judge was part of the solicitor's machinery for prosecution. State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974).

### 2. Remarks Held Erroneous.

#### a. Remarks concerning a Party to the Trial.

**Instruction Where Defendants Pleaded Not Guilty and Made No Judicial Admission.** — Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," is an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

**Parties as Witnesses.** — A judge expressed an opinion as to the credibility and probative value of the defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

**"You Were in the Car When You Were Raped?"** — In rape prosecution, the trial judge's asking the prosecuting witness ". . . you were in the car when you were raped?" was held to be a prejudicial opinion of the court on the facts. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

### b. Remarks concerning Witnesses.

**Remarks Having Effect of Impeaching Witnesses.** —

In a prosecution for crime against nature, the trial judge expressed an opinion in violation of this section when he interrogated defendant's medical witness concerning the witness's opinion that the alleged victim had not been sexually violated per annum on the day of the alleged crime and tended to impeach defendant's witness or cast doubt on his credibility by his line of questioning. State v. Pinkham, 18 N.C. App. 130, 196 S.E.2d 290 (1973).

**Questions Conveying Opinion as to What Has Been Shown by Testimony.** — One of the ways in which the trial judge may violate this section is by posing questions which convey to the jury his opinion as to what has or has not been shown by the testimony of a witness. State v. McEachern, 283 N.C. 57, 194 S.E.2d 787 (1973).

**Statement That Prosecuting Witness' Testimony Had Been Corroborated.** — The error of the positive statement by the trial judge that three witnesses had corroborated the testimony of the prosecuting witness was not cured by the later general statement that it was for the jury to determine. State v. Henson, 20 N.C. App. 282, 201 S.E.2d 62 (1973).

### c. Remarks concerning Weight and Credibility of Testimony.

It is error to intimate an opinion as to the relative strength or weakness of a party's case, or the credibility of his witnesses, or to make any statement such as to invoke sympathy for the prosecuting witness, thereby bolstering that testimony. State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

It is error for the trial judge to intimate that controverted facts have or have not been established, or to place before the jury in a statement of contentions matter which they should not take into consideration in arriving at a verdict. State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

**Argument Repeated by Court as Contention.** — An argument that would be permissible when made by the solicitor may, when repeated by the court as a contention, give emphasis that would weigh too heavily upon defendant, and would constitute a prejudicial charge under this section. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

**Judge's Questioning of Defendant.** — In a prosecution of two defendants for discharging firearms into an occupied building, the trial judge's questioning of the defendants amounted to cross-examination and constituted an expression of opinion on the credibility of defendants' testimony, where the questions included the following: (1) "At the time you fired your shotgun you knew there was someone in the Club, didn't you?"; (2) "If you thought there was trouble brewing outside, why didn't you stay in your house rather than get your gun and go out and get in it?"; and (3) "What have you been tried and convicted for?". State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971).

**Unnecessary and Laborious Recapitulation of Testimony.** — Where, in his charge to the jury the trial judge undertook an unnecessary and laborious recapitulation of the testimony of each witness and recapitulated testimony of the officer which was given only on voir dire in the absence of the jury, inadvertently reviewing for the jury testimony which was material to the charge against defendant, this constituted a misstatement of a material fact not shown in evidence. State v. Logan, 18 N.C. App. 557, 197 S.E.2d 238 (1973), appeal dismissed, 285 N.C. 666, 207 S.E.2d 752 (1974), overruled on another point, State v. Harris, 25 N.C. App. 404, 213 S.E.2d 414 (1975).

**Opinion as to Guilt of Defendant.** — In prosecution for rape and crime against nature, the trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her," intimating to the jury that it was his opinion that the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

### d. Miscellaneous Remarks.

**Expressions by Judge Stated as Contentions May Violate Section.** — Where expressions by the trial judge, in their warmth and vigor, though stated in the form of contentions, are capable of impressing the jury with the strength of the State's case and the weakness of the alibi of the defendant, such expressions, though unintended by the trial judge to prejudice anyone, are in violation of this section and constitute prejudicial error. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

**Judge Sustaining His Own Objections.** — The trial judge expressed an opinion in violation of this section when he sustained his own objections to seven questions propounded by defense counsel to one State's witness and to nine questions propounded by defense counsel to another State's witness, and told defense counsel on two occasions after sustaining his own objections, "You know better than that." State v. Lemmond, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

**Assuming Role of Prosecutor.** — Where on several occasions while defendant's counsel was cross-examining the State's witnesses, the trial judge either sustained objections by the solicitor or interposed his own objections to block legitimate lines of cross-examination, and where, after the State's witness had completed his testimony as to results of the breathalyzer test, the trial judge asked questions of the witness to bring out the fact that the breathalyzer test had been approved for use in this State since 1965 and to bring before the jury that the witness had given the test to persons suspected of driving under the influence of intoxicants many times, the trial judge, temporarily at least, abandoned his role as an impartial jurist and assumed the role of the prosecutor, and in so doing he violated the provisions of this section. State v. Medlin, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

**Unintentional Expression of Opinion on Facts Adverse to Defendant.** — Where the judge, in questioning several prospective jurors who had been challenged by the state for cause when they had stated that they had conscientious scruples against capital punishment, inadvertently over-stepped his self-appointed bounds and unintentionally expressed an opinion on the facts adverse to the defendant, the defendant was granted a new trial. State v. McSwain, 15 N.C. App. 675, 190 S.E.2d 682 (1972).

**Recapitulation of Testimony and Stating State's Contentions Violated Prohibitions of Section.** — In recapitulating the testimony and, more grievously, in stating what was said to be the State's contentions, the judge violated the prohibition against expressing an opinion on the evidence and merits of the case. Such expressions of opinion entitle the defendant to a new trial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

**Where part of the court's instructions omitted the single word "if,"** it resulted in an expression of opinion by the court that the State had already shown that defendant's act was criminally negligent. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

**Criminal Negligence.** — Where a portion of the charge amounted to a statement that, if the stabbing was done, an act of criminal negligence had been committed by defendant, that portion was held to be a statement of opinion. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

The showing that defendant was seated at a table, that deceased was standing near him, and that defendant pulled the gun from his pocket after which it fired with the bullet striking deceased in the forehead, would certainly be some evidence that defendant intentionally pointed the gun at the deceased even though it may have fired accidentally. There were sufficient facts presented to support the charge concerning whether defendant handled the gun in a criminally negligent manner. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

**Statement That Jury Would Have to Find Defendant Guilty.** — The trial judge's comment that the jury would have to find the defendant guilty of one of the three offenses which he had previously discussed was prejudicial error and was not cured by construing the charge contextually as a whole. State v. Whitley, 22 N.C. App. 666, 207 S.E.2d 328 (1974).

**Comments made by a trial judge concerning cases involving marijuana,** coming shortly before the defendant's marijuana case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

## III. EXPLANATION OF LAW AND EVIDENCE.

### A. General Consideration of the Charge.

**The Object of Instructions.** —

In accord with 2nd paragraph in original. See State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and declare and explain the law arising on the evidence. State v. Cousin, 292 N.C. 461, 233 S.E.2d 554 (1977).

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict. For this reason, the Supreme Court has consistently ruled that this section imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In applying the law to the evidence, the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted either in the affirmative or the negative. Mozingo v. Mid-South Ins. Co., 29 N.C. App. 352, 224 S.E.2d 208 (1976).

**Court, Not Counsel, to Instruct Jury.** — It is the function of the court, not of the counsel for either party, to instruct the jury as to the law arising on the evidence. State v. Jackson, 284 N.C. 321, 200 S.E.2d 626 (1973).

**A charge to the jury should present, etc.** —

Every substantial feature of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue. State v. Best, 31 N.C. App. 389, 229 S.E.2d 202 (1976).

It is prejudicial error when the court fails to instruct the jury on a substantial feature of the case arising on the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Where the charge as to the contentions of the parties accurately reflects the essential features of the case, in the absence of a request for further instructions or in apt time asking the court to give further or different contentions, the charge as to the contentions is sufficient. Braswell v. Purser, 16 N.C. App. 14, 190 S.E.2d 857, aff'd, 282 N.C. 388, 193 S.E.2d 90 (1972).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto and states the contentions of the parties, it complies with this section. State v. Middleton, 25 N.C. App. 632, 214 S.E.2d 248 (1975).

**Instructions Must Be Sufficiently Definite.**

The trial judge is not required to instruct with any greater particularity upon any element of the offense than is necessary to enable the jury to apply that law to the evidence bearing on the element. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

New trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

**Charge Must Be Considered, etc.** —

The charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976).

The judge's words in a charge may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977).

It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, cert. denied, 288 N.C. 733, 220 S.E.2d 352 (1975).

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Respass, 27 N.C. App. 137, 218 S.E.2d 227, cert. denied, 288 N.C. 733, 220 S.E.2d 352 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977).

Where it was clear that some of the errors in a charge resulted from lapus linguae on the part of the trial judge and it was also apparent that many of the errors of omission and commission resulted from the taking and transcription of the record, and the Supreme Court doubted that any part of the charge as challenged by any one assignment of error would constitute prejudicial error, it concluded that the total charge failed to clarify the material issues so as to aid the jury in reaching a verdict. State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971).

A charge must be considered contextually as a whole. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

The jury charge must be read as a whole and construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. State v. Laws, 16 N.C. App. 129, 191 S.E.2d 416 (1972).

The charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from any prejudice to defendant. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

The charge must be read and considered in its entirety and not in detached fragments, and if, when read as a composite whole, error prejudicial to the appealing party is not shown, a new trial will not be granted. Blair v. Honeycutt, 18 N.C. App. 568, 197 S.E.2d 233 (1973).

Defendant cannot be permitted to select portions of the charge — even though objectionable when standing alone — and assign errors to them if those portions can be readily explained by reference to the charge in its entirety, and the charge in its entirety appears to be without prejudicial error. State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

Isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

On appeal, a charge to a jury must be read and considered in its entirety. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

A charge must be construed as a whole, and isolated portions of a charge will not be held to be prejudicial where the charge as a whole is correct and free from objection. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

It is well-settled that the charge of the court to the jury will be construed contextually, and segregated portions will not be held prejudicial error where the charge as a whole is free from objection. State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

A charge must be read contextually, and when this is done, if it is manifest that the jury understood that each element had to be proved by evidence establishing the same beyond a reasonable doubt, then there is no error. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

A charge to the jury must be read and considered in its entirety and not in detached fragments. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

The fact that some expressions in the charge, standing alone, might be considered erroneous will afford no ground for reversal. State v. McCall, 31 N.C. App. 543, 230 S.E.2d 195 (1976).

**Conflicting instructions, etc. —**

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury may have acted upon the incorrect part of the charge, or to phrase it differently, since it cannot be known which instruction was followed by the jury. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and an incorrect charge. State v. Carver, 286 N.C. 179, 209 S.E.2d 785 (1974).

It must be assumed on appeal of two conflicting instructions to the jury that the jury was influenced by that portion of the charge which is incorrect. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

**Charge Failing to Submit an Essential, etc. —**

The trial judge committed prejudicial error by failing to explain the essential elements of the crime charged. State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

**Instructions Should Be Fair to Both Sides.** — A compliance with this section gives to the jury instructions which are designed to be fair to both sides. Key v. Merritt-Holland Welding Supplies, Inc., 5 N.C. App. 654, 169 S.E.2d 27 (1969).

**Inadvertent Statement.** — Where the court instructed the jury to disregard an inadvertent statement previously made and then proceeded to charge the jury correctly, the inadvertence was discovered immediately and the correction was prompt and complete, this is sufficient and is all the law requires. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

**The litigants are not entitled to determine the exact sequence of the charge** to the jury, and are not entitled to have the trial judge use the words and expressions as formulated by the litigant. Key v. Merritt-Holland Welding Supplies, Inc., 5 N.C. App. 654, 169 S.E.2d 27 (1969).

**Requests for Instructions, etc. —**

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, it complies with this section, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must apply tender request for special instructions. State v. Floyd, 15 N.C. App. 438, 190 S.E.2d 353, cert. denied, 281 N.C. 760, 191 S.E.2d 363 (1972); State v. Nettles, 20 N.C. App. 74, 200 S.E.2d 664 (1973), appeal dismissed, 284 N.C. 621, 202 S.E.2d 277 (1974); State v. Murray, 21 N.C. App. 573, 205 S.E.2d 587 (1974); State v. Walker, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

The fact that a limiting instruction was not repeated in the charge is not error in the absence of a request for a special instruction. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

It is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction, otherwise they are deemed to have been waived and will not be considered on appeal. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

The law requires that any alleged inaccuracies in the trial court's charge to the jury be called to the attention of the court before the jury retires in order to give the trial judge an opportunity to correct any alleged inaccuracy in his review of the evidence and statement of the contentions of the parties. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976).

A party desiring further elaboration must aptly tender requests for further instructions. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

**Where the charge to the jury is not included in the record** on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by this section. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

**Insubstantial technical errors in the charge** which could not have affected the result will not be held prejudicial. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977).

**Erroneous Instruction Not Cured, etc. —**

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, particularly when the incorrect portion of the charge is the application of the law to the facts. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

When the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

**Broadside Exception Untenable. —**

An exception to the entire charge of the court is a broadside exception and presents no question for review upon appeal. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered. Panhorst v. Panhorst, 9 N.C. App. 258, 175 S.E.2d 609 (1970), rev'd on other grounds, 277 N.C. 664, 178 S.E.2d 387 (1971).

**Exception Must Be Specific. —**

An alleged error in the charge of the court to the jury must be specified, both as to alleged error in the charge actually given and as to an alleged failure to give an instruction required by the law. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

The exception and assignment of error to the failure of the court to charge the law arising on the evidence on a particular aspect should set out the appellant's contention as to what the court should have charged, or the particular matters which the appellant asserts were omitted. Panhorst v. Panhorst, 9 N.C. App. 258, 175 S.E.2d 609 (1970), rev'd on other grounds, 277 N.C. 664, 178 S.E.2d 387 (1971).

An assignment of error to the charge on the ground that it failed to explain and apply the law to the evidence as required by statute is a broadside exception and ineffectual, it being required that the assignment of error set forth the part of the charge challenged and point out specifically the error complained of. State v. Black, 14 N.C. App. 373, 188 S.E.2d 634, appeal dismissed, 281 N.C. 624, 190 S.E.2d 467 (1972).

**Where the exception fails to specify the matters omitted, it cannot be aided by an assignment of error,** since the appellee is entitled to be apprised of the theory of the appeal. Panhorst v. Panhorst, 9 N.C. App. 258, 175 S.E.2d 609 (1970), rev'd on other grounds, 277 N.C. 664, 178 S.E.2d 387 (1971).

**Specific Prayers, etc. —**

If defendant desires fuller instructions as to the evidence or contentions, he should so request. His failure to do so precludes him from assigning this as error on appeal. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Absent a special request, the judge is not required to instruct the jury that a defendant's failure to testify does not create any presumption against him. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

When the trial judge has instructed the jury correctly and adequately on the essential features of the case but defendant desires more elaboration on any point or a more detailed explanation of the law, then he should request further instructions. Otherwise, he cannot complain. State v. Everette, 284 N.C. 81, 199 S.E.2d 462 (1973).

A defendant who desires a more detailed statement of his contentions must request it from the court. State v. Murray, 21 N.C. App. 573, 205 S.E.2d 587 (1974).

**Errors Should Be Pointed Out before Verdict. —**

In accord with 2nd paragraph in original. See State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

Any error or omission by the court in its review of the evidence in the charge to the jury must be then called to the attention of the court so that the court may have an opportunity to make the appropriate correction. State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction. State v. Greer, 18 N.C. App. 655, 197 S.E.2d 601 (1973); State v. Flannery, 31 N.C. App. 617, 230 S.E.2d 603 (1976).

The general rule in this State is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on

appeal. State v. West, 21 N.C. App. 58, 203 S.E.2d 86, cert. denied, 285 N.C. 376, 205 S.E.2d 101 (1974); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

In order for inaccuracies in the recitation of facts or contentions in jury instructions to be considered on appeal, they must be called to the attention of the trial judge in time for him to correct them at trial. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

Any misstatements of counsel's contentions made by the trial judge to the jury must be brought to the trial judge's attention before the jury retires for deliberation so that he has an opportunity for correction. State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976).

Objection to the trial court's recapitulation of the evidence should have been made before the jury retired so as to afford the court an opportunity for correction; otherwise, the objections are deemed to have been waived and will not be considered on appeal. State v. Tolley, 30 N.C. App. 213, 226 S.E.2d 672, cert. denied, 291 N.C. 178, 229 S.E.2d 691 (1976).

Objections to that portion of the charge which reviews the evidence and states the contentions of the parties must be made before the jury retires so as to give the trial judge an opportunity to correct any misstatements. Otherwise, any objection to the misstatement will be deemed to have been waived and will not be considered on appeal. State v. Womble, 292 N.C. 455, 233 S.E.2d 454 (1977).

**Cure of Error in Instruction.** — Any error in the instruction excepted to as an expression of the court's opinion on the facts was completely cured by the instruction which followed, that the court had no opinion. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

**An exception to an excerpt from charge** ordinarily does not challenge the omission of the court to charge further on the same or any other aspect of the case. Panhorst v. Panhorst, 9 N.C. App. 258, 175 S.E.2d 609 (1970), rev'd on other grounds, 277 N.C. 664, 178 S.E.2d 387 (1971).

**Objections Will Not Be Considered for First Time on Appeal.** — Where defendant did not object to the court's statement of the State's contentions at the time they were given, objections thereto will not be considered for the first time on appeal. State v. King, 6 N.C. App. 702, 171 S.E.2d 33 (1969).

**But Expressions of Opinion May Be Objected to on Appeal.** — Exceptions to an expression of opinion in the statement of contentions may be taken by the aggrieved party for the first time upon appeal. Voorhees v. Guthrie, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

### B. Explanation Required.

### 1. In General.

**Rule Stated.** —

In accord with 4th paragraph in original. See State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

In accord with 13th paragraph in original. See Mozingo v. Mid-South Ins. Co., 29 N.C. App. 352, 224 S.E.2d 208 (1976).

This section requires the judge to explain the law but give no opinion on the facts. The purpose of the section is to secure the right of every litigant to have his cause considered by an impartial judge and an unbiased jury. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

This statute requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

The requirement of this section is met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

The judge is required to declare and explain the law arising on the evidence. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

It is the duty of the court to state the evidence to the extent necessary to explain the application of the law arising thereon. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

This section requires the trial judge to clarify and explain the law arising on the evidence, and a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial. State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

The presiding judge in his charge to the jury must declare and explain the law arising on the evidence relating to each substantial feature of the case. State v. Everette, 284 N.C. 81, 199 S.E.2d 462 (1973).

Nothing more is required than a clear instruction that applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

In applying the law to the evidence, the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted either in the affirmative or the negative. Mozingo v. Mid-South Ins. Co., 29 N.C. App. 352, 224 S.E.2d 208 (1976).

**Where the content and form of the questions did not clearly apply the law to the facts,** and the charge left the jury with no clear choice between second-degree murder and manslaughter, the charge was held erroneous. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971).

**Recital of What Evidence Tended to Show without Instruction on Application of Law.** — Where the trial court gives a recital of what some of the evidence tended to show, but no instruction is given as to how the law applies to it, the jury is left unaided to apply the abstract principles of law to the facts, and this constitutes error requiring a new trial. State v. McKinnon, 9 N.C. App. 724, 177 S.E.2d 299 (1970).

**Failure to Instruct concerning Admissions as to Convictions of Unrelated Prior Criminal Offenses.** — The trial court's failure to instruct that admissions as to convictions of unrelated prior criminal offenses were not competent as substantive evidence but were competent as bearing upon defendant's credibility as a witness does not constitute error, absent a request for such instruction. State v. Alexander, 16 N.C. App. 95, 191 S.E.2d 395, cert. denied, 282 N.C. 305, 192 S.E.2d 195 (1972).

**When two or more defendants are jointly charged with a crime,** a charge which can be construed to mean that the jury must convict all if it finds one guilty constitutes reversible error. State v. Mitchell, 20 N.C. App. 437, 201 S.E.2d 720 (1974).

**Where Facts Are Simple.** —

Where the evidence is simple, direct and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with this section. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976).

**Contention of Parties.** —

The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section. Voorhees v. Guthrie, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

Although the judge is not required to state or recapitulate the contentions of the parties, it is permissible for him to do so. State v. Holway, 8 N.C. App. 340, 174 S.E.2d 54 (1970).

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party. State v. Billinger, 9 N.C. App. 573, 176 S.E.2d 901 (1970).

Though this section does not require the trial judge to state the contentions of either party, the statute does require that the trial judge give "equal stress to the State and defendant in a criminal action"; therefore, where the court gives the State's contentions but gives no contentions of the defendant, the mandate of this section is not satisfied. State v. Lane, 18 N.C. App. 316, 196 S.E.2d 597 (1973).

A judge is not required by law to state the contentions of the parties, but when he does give the contention of the State on a particular phase of the case, it is error to fail to give defendant's opposing contention arising out of the evidence on the same aspect of the case. State v. Thomas, 284 N.C. 212, 200 S.E.2d 3 (1973).

The trial judge is not required by this section or other law to give the contention of the parties; but when he does state the contentions of the State on a particular aspect of the case, it is error to fail to state defendant's opposing contentions arising out of the evidence, or lack of the evidence, on the same aspect of the case. State v. Vail, 26 N.C. App. 73, 214 S.E.2d 796, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975).

Contentions which may be argued properly by counsel may be highly improper when stated by the judge. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

**Stating Assumptions of Party as Contentions.** — The trial judge does not comply with the provisions of this section by stating as contentions what one of the parties assumed. Johnson v. Douglas, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

Where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

**Explanation of Subordinate Features, etc.** —

In accord with 5th paragraph in original. See State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with this section and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Instructions to scrutinize the testimony of an alleged accomplice, or that the jury should not consider evidence withdrawn by the court, or explaining the difference between corroborative and substantive evidence, or charging how evidence relating to the credibility of a witness should be considered, or that certain evidence had been admitted solely for the purpose of corroboration, or that the jury should take its own recollection of the evidence, or instructions on defendant's evidence of good character, relate to subordinate features upon which the court is not required to charge in the absence of request for special instruction aptly made. State v. Witherspoon, 5 N.C. App. 268, 168 S.E.2d 243 (1969).

A party desiring further elaboration on a particular point, or of his contention, or a charge on a subordinate feature of the case must aptly tender his request for special instructions. Instructions to scrutinize the testimony of an alleged accomplice are not required when, as here, no request therefor has been made. State v. Dunbar, 8 N.C. App. 17, 173 S.E.2d 543 (1970).

Where the court adequately charges on all substantive features of a case, it will not be error to fail to give instructions on subordinate features of the case, since the party desiring such instruction or greater elaboration is under a duty to request it. Braswell v. Purser, 16 N.C. App. 14, 190 S.E.2d 857, aff'd, 282 N.C. 388, 193 S.E.2d 90 (1972).

Instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor are subordinate features of the case. In the absence of special request, the trial judge is not required to instruct as to subordinate features. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973); State v. Williams, 289 N.C. 439, 222 S.E.2d 242 (1976).

In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor have been considered subordinate features of the case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

An instruction as to the credibility of an interested witness relates to a subordinate feature of the case and the court is not required to charge thereon absent a request. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

When the trial judge undertakes to instruct on a subordinate feature of a case he must do so accurately and completely. State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977).

### 2. Statement of Evidence.

**In General. —**

When instructions which are not based upon a state of facts presented by some reasonable view of the evidence are prejudicial to the accused, he is entitled to a new trial. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

It is sufficient for the trial judge to fairly summarize the evidence for the purpose of explaining the law applicable thereto. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

In reviewing the evidence, the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

**Slight inaccuracies in the statement, etc. —**

Objections to minor discrepancies in the trial judge's statement of the evidence to the jury are deemed to be waived and will not be considered on appeal unless called to the attention of the court in time to afford opportunity for correction. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Slight inaccuracy in stating evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

A slight inaccuracy in the statement of the evidence must be called to the court's attention in time to afford opportunity for correction, else an exception thereto will not be considered on appeal. State v. Sanders, 29 N.C. App. 662, 225 S.E.2d 620 (1976).

Any minor misstatement in the trial judge's statement of facts or contentions must be brought to his attention at trial. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

An inadvertence in recapitulating the evidence must be called to the attention of the court in time for correction and an objection after verdict comes too late. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

**And a defendant may not avoid the operation of this rule** by contending that the trial judge's misstatements were impermissible expressions of opinion. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

**Recapitulation Unnecessary. —**

In accord with 3rd paragraph in original. See State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Greene, 278 N.C. 649, 180 S.E.2d 789 (1971); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

In accord with 6th paragraph in original. See State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

In instructing the jury, the court is not required to recapitulate all of the evidence. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

The trial judge is not required to recapitulate the testimony. He is only required to summarize the evidence sufficiently to permit him to explain and apply the appropriate principles of law. State v. West, 21 N.C. App. 58, 203 S.E.2d 86, cert. denied, 285 N.C. 376, 205 S.E.2d 101 (1974).

A recapitulation of the principal features of the evidence relied on satisfies the requirement of this section. State v. Hatch, 21 N.C. App. 148, 203 S.E.2d 334, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

The law does not require the judge to review the facts and take up each witness that has testified one by one and repeat the testimony of the witness. State v. Vickers, 22 N.C. App. 282, 206 S.E.2d 399, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974).

The duty imposed upon the trial judge is to review only so much of the testimony as is necessary for him to apply the law. State v. Vickers, 22 N.C. App. 282, 206 S.E.2d 399, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974).

The requirement of this section that the judge state the evidence is met by presentation of the principal features of the evidence relied on by the prosecution and the defense. A "verbatim recital of the evidence" is not required. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

The trial judge is not required to recapitulate the testimony of a witness in the exact words used by the witness. State v. Bobbitt, 29 N. C. App. 155, 223 S.E.2d 398 (1976).

The law does not require the trial judge to review all of the evidence nor to recapitulate the testimony of the witnesses one by one. The duty imposed upon the trial judge is to summarize only so much of the evidence as is necessary for him to apply the law. State v. Moore, 31 N.C. App. 536, 230 S.E.2d 184 (1976).

**Recapitulation Must Be with Reasonable Accuracy.** — The evidence offered by defendant as well as by the State, together with the contentions, is to be recapitulated with reasonable accuracy. The law requires no more. State v. Gaines, 283 N.C. 33, 194 S.E.2d 839 (1973).

**Court May Not Assume That Any Necessary Fact Is Proved.** — It is reversible error for the court to assume that any fact necessary to establish the guilt of the defendant has been proved, and thus, by its instructions, to relieve the jury of its obligation to consider that issue. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

**Failure to include instructions as to the purposes for which evidence was received** is not ground for exception unless counsel has requested such an instruction. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

**Improper Basis for Jury Instructions.** — The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, nor upon a supposed state of facts. State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972).

**Contentions of Parties.** —

A judge is not required to state the contentions of the parties in his charge to the jury. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

The judge, in his instructions to the jury, must recite the evidence and may not rely solely on the contentions of the parties. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

Where the court made no reference in the charge to the evidence except in a short statement as to the contentions of the parties, that was held insufficient to satisfy the requirements of this section. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

Where the court referred to the evidence by its substance in the form of contentions rather than by recital of the words of the witnesses, there was a lack of indication that the jurors were in any wise misled or confused. State v. Jennings, 279 N.C. 604, 184 S.E.2d 254 (1971).

It is not error for the trial judge to instruct the jury in terms of the State's contentions where the record discloses evidence from which inferences drawn by the court could legitimately, fairly and logically be drawn by the jury. State v. Lyles, 19 N.C. App. 632, 199 S.E.2d 699, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

**Instruction on Weight of Evidence.** — That testimony is admissible does not require the judge, without a request therefor, to instruct the jury as to the weight to be given the evidence. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

**Discretion of Court as to Jury's Request for Restatement of Evidence.** — It is discretionary with the court to grant or refuse the jury's request for restatement of the evidence. State v. Crane, 11 N.C. App. 721, 182 S.E.2d 225 (1971).

### 3. Explanation of Law.

**In General.** —

In accord with 10th paragraph in original. See Mozingo v. Mid-South Ins. Co., 29 N.C. App. 352, 224 S.E.2d 208 (1976).

In accord with 11th paragraph in original. See Mozingo v. Mid-South Ins. Co., 29 N.C. App. 352, 224 S.E.2d 208 (1976).

In accord with 14th paragraph in original. See Mozingo v. Mid-South Ins. Co., 29 N.C. App. 352, 224 S.E.2d 208 (1976).

The trial judge has great discretion in the manner in which he charges the jury, but he must explain every essential element of the offense charged. State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

This section requires that the trial judge clarify and explain the law arising on the evidence. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

It is the duty of the trial judge, not defendant's expert medical witness, to explain the law and define legal terms such as "intent." State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

**It is prejudicial error to instruct, etc. —**

In accord with original. See State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

**Absence of Request, etc. —**

In accord with 1st paragraph in original. See State v. Neagle, 29 N.C. App. 308, 224 S.E.2d 274 (1976).

In accord with 6th paragraph in original. See State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

It is the duty of the trial judge even without special request to declare and explain the law as to all substantial features of the case arising on the evidence. State v. Blizzard, 7 N.C. App. 395, 172 S.E.2d 106 (1970); State v. Oxendine, 20 N.C. App. 458, 201 S.E.2d 542 (1974).

Even in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. Tharpe v. Brewer, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

This section requires that the trial judge fully instruct the jury as to the law based on the evidence in the case and to charge the jury on all substantial features of the case arising on the evidence, without special request therefor. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Under this section it is the duty of the trial court to declare and explain the law arising from the evidence even without a special request for instruction. State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

In the absence of a request from the defendant, the court is not required to define reasonable doubt or to discuss the significance of circumstantial evidence. State v. Murray, 21 N.C. App. 573, 205 S.E.2d 587 (1974).

Failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error, even in the absence of a request for special instructions. State v. Neagle, 29 N.C. App. 308, 224 S.E.2d 274 (1976).

**The mandate of this section is not met, etc.—**

In accord with 1st paragraph in original. See Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

**Judge Must Explain Law, etc. —**

The judge must declare and explain the law as it relates to the various aspects of the testimony offered. Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

The law must be applied to the facts in the judge's instruction to the jury. Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under this section. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976).

**The jury must not be left to apply the law to the facts** and to decide for themselves what the party did, if anything, which would constitute a violation of the statute. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

**And it is not sufficient merely for the court to read a statute, etc. —**

It is error for a trial court to read the provisions of a statute to a jury without giving an explanation thereof in connection with the evidence where such explanation is necessary to inform the jury as to the meaning of the statute and as to its bearing on the case. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

It is not sufficient for the court merely to read the statute under which the accused stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. State v. Pittman, 12 N.C. App. 401, 183 S.E.2d 307 (1971).

**But Reading Statute, etc. —**

Where the court, in charging the jury, read the statute upon which the indictment was based and pointed out the material part of the statute which applied to the charge against the defendant, this instruction was in keeping with the requirements of this section which makes it the duty of the judge to declare and explain the law of the case. State v. Rennick, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

**It is not error for the court to fail to define and explain words of common usage and meaning** to the general public, in the absence of a request for special instructions, and this applies equally to essential elements of the crime charged as well as to other legal terms contained in a charge. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

**Effect of Failure to Request Special Instructions. —**

In accord with original. See Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

**It is not incumbent upon the trial judge to charge with regard to the law on something that is no longer an issue** before the jury. The statute only requires the court to state only such evidence as is necessary to explain and apply the law to the facts in the case. State v. Phillips, 5 N.C. App. 353, 168 S.E.2d 704 (1969).

**Substantial Compliance, etc.** —

The trial court is not required to give a requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

If a request is made for a specific instruction which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel, must charge the jury in substantial conformity to the prayer. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

The trial court did not err by failing to give requested instructions where defendant submitted an exhaustive list of definitions which was repetitious at best, but rather, it was sufficient that the court gave the requested instructions in substance. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

**Isolated Expressions Afford No Ground for Reversal If Charge as Whole Presents Law Fairly.** — If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. State v. McWilliams, 277 N.C. 680, 178 S.E.2d 476 (1971); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

**Charge on Degrees of Crime.** —

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

When there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding defendant guilty of a higher degree of the same crime. State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

It is not proper for the trial judge to charge the jury on a lesser included offense unless there is some evidence from which a commission of such lesser included offense can be found. State v. Scales, 18 N.C. App. 562, 197 S.E.2d 278 (1973).

**Informing Jurors as to Punishment.** — In the absence of some compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt, and is therefore no concern of the jurors. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

In noncapital cases where the jury requests information as to punishment, the trial judge should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

### C. Illustrative Cases.

**Defendants Charged with Identical Offenses.** — Because the defendants were charged with identical offenses and because the evidence adduced at the consolidated trial was identical as to each defendant, it was not necessary for the trial judge to give wholly separate instructions as to each defendant in order to comply with this section. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

It was reasonable for the court to declare and explain the law arising from the evidence in the cases as to both defendants simultaneously. However, the trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. State v. Lockamy, 31 N.C. App. 713, 230 S.E.2d 565 (1976).

**Negligence and Proximate Cause.** —

Where trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence, the contentions of the parties, and instructed as to measure of damages, but failed to instruct the jury as to what facts if found by them to be true would constitute negligence, it was reversible error. Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

**Civil and Criminal Negligence.** — Once the judge has given the jury the instructions which the pleadings and evidence require on the law of civil negligence, there is no need for him to superimpose an explanation of the law of criminal negligence. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

**Negligence Per Se.** — A charge with respect to when violation of a statute is negligence per se and when it is not negligence per se was not warranted where the evidence did not disclose any violation of a motor vehicle statute, and the instruction served only to confuse the jury. Petty v. Aldridge, 20 N.C. App. 514, 201 S.E.2d 736 (1974).

**Alibi.** —

In the absence of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi. Conversely, when there has been sufficient evidence in the case to raise an issue as to alibi and the defendant has specifically requested the trial court to charge the jury in accordance with proper instructions submitted by him on this subject, it is the duty of the court so to instruct, and the failure, or refusal, to instruct as to alibi under such circumstances constitutes prejudicial and reversible error. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Notwithstanding the court's instruction that the burden of proof is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant was present and that he committed the crime, if a particular defendant is apprehensive that the jury will be misled unless the court gives an instruction substantially like that approved in prior alibi cases, he will be entitled to such instruction upon special request therefor. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Defendant and his counsel may determine for themselves whether they would like for the court to give such an instruction. Under certain circumstances, it may be that the giving of such an instruction will so concentrate attention upon the subject of alibi as to divert attention from unrelated weaknesses in the State's case. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

When an instruction as to the legal effect of alibi evidence is given, whether by the court of its own motion or in response to request, such statement must be correct. State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973).

Where the trial judge made it quite clear that the burden was on the State to prove all essential elements of the crime charged and that defendant did not have to prove anything in order to be found not guilty, although the word "alibi" was not mentioned in the charge or in the recapitulation of the evidence, the charge given afforded defendant the same benefits a formal charge on alibi would have afforded. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Where in the charge, the court failed to instruct the jury that the defendant, who relied on an alibi, did not have the burden of proving it, defendant suffered prejudicial error. State v. Moore, 19 N.C. App. 368, 198 S.E.2d 760 (1973).

A defendant who merely denies that he was at the scene of the crime, without producing any evidence to show that he was at any other place, is not entitled to an alibi instruction. State v. Grant, 19 N.C. App. 401, 199 S.E.2d 14, appeal dismissed, 284 N.C. 256, 200 S.E.2d 656 (1973).

Where the jury was not instructed that defendant, who relied on an alibi, did not have the burden of proving it, and the trial occurred prior to the opinion in State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973), the omission of the instruction constituted prejudicial error. State v. Brown, 20 N.C. App. 483, 201 S.E.2d 577 (1974).

Although the desired form of pattern instruction on the defense of alibi was not offered, in substance, where defendant twice received the benefit of the instruction that witnesses testified that he was not at the scene of the robbery on the date and time in question but was elsewhere, and could not, therefore, have committed the act, alone or in concert, no error in instructions was committed. State v. Shore, 20 N.C. App. 510, 201 S.E.2d 701, aff'd, 285 N.C. 328, 204 S.E.2d 682 (1974).

The trial judge is not required to instruct on legal effect of an alibi unless defendant specifically requests such instruction. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Mere denial that defendant was at the scene of the crime does not require a charge on the legal effect of an alibi, but rather, the general charge that the jury should acquit the defendant unless it is satisfied beyond a reasonable doubt that the defendant committed the crime is sufficient. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

**Circumstantial Evidence.** —

Jury instructions on circumstantial evidence were adequate where defendant requested no additional instructions; and where the State relied primarily on direct evidence, instructions on circumstantial evidence were not required. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

**Duty of Judge to Determine If Evidence or Deducible Inferences Prove Lower Grade of Murder.** — It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it is the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

**Where there was no evidence to support a conviction of assault,** the trial court did not err in refusing to give instructions on the lesser included offense of assault in a prosecution for aiding and abetting in an attempted robbery with the use of firearms. State v. Parker, 16 N.C. App. 165, 191 S.E.2d 244, cert. denied, 282 N.C. 307, 192 S.E.2d 196 (1972).

**Prosecution for Manslaughter.** — Where in a prosecution for manslaughter the trial judge stated defendant's evidence to the extent necessary to explain the application of the law thereto, particularly with regard to the defense that he was not intoxicated and that his conduct in driving his car and his loss of memory concerning the collision had been caused by being struck on the head in the fight and defendant did not request any additional instructions, there was no prejudicial error. State v. Craig, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

**Use of Certain Terms in Manslaughter Instruction.** — The frequent and interchangeable use of the terms "intentional killing" and "intentional shooting" constituted error in a manslaughter instruction inasmuch as it pointed to a finding of malice, but the same charge in an instruction on second-degree murder would in no manner be deemed prejudicial. State v. Briggs, 20 N.C. App. 368, 201 S.E.2d 580 (1974).

**A trial court's instruction which mistakenly asserted that the defendant took the stand and testified** as to material matters of the case was reversible error, even though the defendant did not call this misstatement of the evidence to the court's attention before the jury retired to consider the case. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

It was prejudicial for the trial judge, when the defendant did not testify, to inform the jury that the defendant testified that he did shoot "into" the car when in fact a deputy sheriff testified that the defendant told him that he had shot "at" the car. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

**Instruction as to Defendant's Failure to Testify.** — Absent a special request, the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him. State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973).

**Where the judge informed the jury that the defendant "told sheriff about it,"** this was stating as a fact that the defendant had told the sheriff about the matter, and it amounted to an expression of an opinion by the judge on a crucial fact in the case; it was for the jury, not the judge, to determine whether the defendant had in fact told the sheriff about the matter; and if so, what it was that he had told him. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

Where the trial judge attributed much of what the deputy sheriff testified that the defendant told him, as having been testified to by the defendant himself, the case of the State was strengthened to the prejudice of the defendant. State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

**Self-Defense.** —

Where, in a murder case, an instruction on self-defense did not require defendant to show that he was not the aggressor and did not use excessive force in order to be acquitted upon his plea of self-defense, this was error favorable to the defendant of which he cannot complain. State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973).

Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

In cases where the defendant has met his burden of production for self-defense, the failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury is prejudicial error and entitles the defendant to a new trial. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Failure to include not guilty by reason of self-defense in the court's final mandate to the jury, where required, is not cured by the discussion of the law of self-defense in the body of the charge to the jury. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

As to the proper charge to the jury on the verdict of not guilty by reason of self-defense, see State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Where State's evidence presents testimony which would permit, but not require, the jury to find that: (1) Defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm, the evidence was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case and the court's failure to so do constituted prejudicial error. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Where defendant's evidence, even though contradicted by the State, raised an issue of self-defense, whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge, and the failure of the trial court to charge on self-defense was error. State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976).

If defendant's evidence raises the issue of self-defense, the court has a duty to instruct the jury on this issue even though defendant neglects to request the instructions. State v. Taylor, 33 N.C. App. 70, 234 S.E.2d 202 (1977).

**Failure to Instruct on Right of Defendant to Go to Defense of Third Person.** — Where defendant saw the victim force his former girl friend from a dance hall and down the street several blocks, knew that victim had threatened to kill the girl and that he was a dangerous man with a propensity for violent conduct, observed that the victim was acting in a wild and irrational manner as if he had been drinking or taking some drugs and observed that the victim reached for his pocket just before defendant shot him, the trial court committed prejudicial error in failing to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault, since the court must instruct the jury on all substantial features of the case that arise from the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

**Where trial judge asked questions for clarification with regard to defendant's testimony** that deceased was driving fast prior to the shooting, that defendant told deceased to slow down, that deceased threatened to kill defendant, that deceased pulled a pistol, and defendant's reason for reloading the pistol, where the questions appeared to be beneficial rather than prejudicial to defendant's case since they tended to exculpate rather than inculpate her, and where the questions were restricted to statements previously testified to by defendant, there was no error by trial judge in such questions. State v. Griffin, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

**Degrees of Crime.** —

Where all of the evidence indicated that the value of the stolen property exceeded $200.00, the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

In a prosecution for driving under the influence of intoxicating liquor, where the record was devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence, the trial judge was not required to charge the jury on the lesser included offense of reckless driving. State v. Pate, 29 N.C. App. 35, 222 S.E.2d 741 (1976).

Trial judge's charge to the jury in a prosecution for first-degree murder placing the burden on defendant to rebut the presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to instructions relating to second-degree murder and manslaughter. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

**Divorce.** — Where plaintiff seeking divorce offered evidence tending to show that she left the home because of the indignities heaped upon her person by defendant, it was also necessary for her to satisfy the jury that such acts by her husband were not the result of adequate provocation on her part. The judge's failure to so instruct the jury constituted prejudicial error and requires a new trial. Campbell v. Campbell, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

**In a dissemination of obscenity case,** the properly denied request for an instruction to the jury that if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case, and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under the First and Fourteenth Amendments to the Constitution of the United States, and that it would be the duty of the jury to return a verdict of not guilty. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

**Judicial Notice.** — In a prosecution for taking a deer between the hours of sunset and sunrise on a public highway by the use of artificial light, the trial court did not express an opinion that the State had proved the time of commission of the offense by its instruction that as a matter of law "a few minutes after seven o'clock on December 9 is after sunset," the instruction amounting to no more than judicial notice of a physical fact of general knowledge. State v. Link, 13 N.C. App. 568, 186 S.E.2d 634 (1972).

**Contention That Instruction Inadequate in That Jury Could Return Compromise Verdict.** — A contention that the court's instructions in an armed robbery prosecution were inadequate in that the jury could have returned a compromise verdict, even though it followed the court's instructions, was held to be merely speculation and without merit. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972).

**Failure to Accede to Juror's Request for Review of Instructions Given Day Before.** — See State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

**Defining Assault with Intent to Commit Rape.** — It was not prejudicial error for the court to describe elements of the crime of rape in defining the crime with which defendant was charged, assault with intent to commit rape. State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

**Failure to Define Words "Drunk" or "Intoxicated".** — In a prosecution for public drunkenness, the trial court erred in failing to define what would constitute being "drunk" or "intoxicated" in order to sustain a conviction for a violation of § 14-335. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

**Driving under Influence of Intoxicating Liquors.** — The court did not commit reversible error when it inadvertently used the words "appreciable extent" rather than "appreciable impairment" when referring to the effect which the intoxicating liquors must have upon an individual to sustain a conviction for driving under the influence. State v. Payne, 19 N.C. App. 511, 199 S.E.2d 132 (1973).

**Instruction as to Criminal Presumption under § 20-139.1.** — Court erred, in a civil case, when it instructed the jury as to the rebuttable criminal presumption created by § 20-139.1, arising from the fact that a person has .10 percent or more by weight of alcohol in his blood. Wood v. Brown, 20 N.C. App. 307, 201 S.E.2d 225 (1973).

**Reckless Driving.** —

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, this section requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

**Instruction Applying Law to Facts in Witness' Testimony.** — Although defendant did not testify or offer evidence, he was entitled to an instruction applying the law to the facts stated in the testimony of a witness whose testimony, if accepted, disclosed facts sufficient in law to constitute a complete defense to murder committed in the perpetration of the felony created by § 14-34.1. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

**An instruction on "heat of passion"** in a murder case is inappropriate when not supported by the evidence. State v. Briggs, 20 N.C. App. 368, 201 S.E.2d 580 (1974).

**The trial court's instruction in a murder prosecution complied with this section** where it explained the law arising on the evidence, it correctly defined each element of the crimes of second-degree murder and manslaughter, it explained the law of self-defense, it did not amount to a comment on the evidence, and it properly failed to define proximate cause. State v. Jefferies, 16 N.C. App. 235, 192 S.E.2d 104, cert. denied, 282 N.C. 428, 192 S.E.2d 838 (1972).

In a first-degree murder case, the portion of the court's charge to which defendant excepted, in which the court referred to the opinion testimony of the doctors as to the cause of death was not error where the court's charge fairly and accurately reflected the testimony of the medical experts, and no violation of this section was made to appear. State v. Strickland, 21 N.C. App. 545, 204 S.E.2d 888 (1974).

In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

**Instruction as to When Verdict of First-Degree Murder Could Be Rendered.** — Court erred in charging that a verdict of murder in the first degree could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or in the attempt to perpetrate a robbery, where the robbery was merged in and became a part of the first-degree murder charge. State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974).

**Instruction for Jury to Deliberate Further.** — In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, where one juror, after the verdict was first returned and the jury was being polled, stated that at that time he had some doubt about defendant's mental capacity, the trial judge's instruction to the jury to deliberate further was not error, since the juror's statement was not a vote of guilty, but indicated only that the verdict was not unanimous. State v. Sellers, 29 N.C. App. 22, 222 S.E.2d 750 (1976).

**Charge on "Serious Injury".** — In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury is any physical injury that causes great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

**In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery,** where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complies with the requirements of this section. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

**In a prosecution for first-degree murder,** a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

**"Delivery" under § 90-87.** — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under § 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

**In a prosecution for armed robbery, where the indictment referred only to the robbery of a single victim** but the trial judge in his charge to the jury referred to another victim, there was no prejudicial variance since there was only a single criminal transaction, and defendant therefore was in no danger of a subsequent prosecution for the robbery of the other victim. State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976).

**Vehicle Speed Misstated.** — Where a witness testified that defendant's vehicle was traveling at a speed of 65 or 70 miles per hour when it collided with plaintiff's vehicle, the fact that the judge also mentioned the speeds 45 to 60 miles per hour in his charges to the jury in the absence of testimony as to these speeds could not have prejudiced defendant. Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976).

**An erroneous instruction on the burden of proof** is not ordinarily corrected by subsequent correct instructions upon the point. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

**Flight from Scene of Crime.** — Trial judge did not err in failing to instruct, without request, on the weight to be given evidence of flight from the scene of a crime since flight is not an element of the State's case nor is its absence a defense, but is rather a circumstance to be considered by the jury in determining a general mens rea in a criminal case. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

**Difference between First- and Second-Degree Murder.** — Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

**Instruction as to Punishment.** — Absent compelling reasons for disclosure, the trial judge should not inform a jury as to punishment. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In a capital case, there may be a compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

If the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

**Entrapment.** — The court did not commit prejudicial error in failing to charge the jury on the law of entrapment. In order for the defense of entrapment to be available to defendant, there must be an intent to commit a crime and such intent must originate from the inducements of a law officer or his agent and not in the mind of the defendant. State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759 (1973).

Where police action did not involve persuasion, fraud, or trickery but rather merely provided defendant with an exposure to temptation, there was no prejudicial error in the failure of the trial judge to instruct on the defense of entrapment. State v. Stanback, 19 N.C. App. 375, 198 S.E.2d 759, cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973), cert. denied, 415 U.S. 990, 94 S. Ct. 1589, 39 L. Ed. 2d 887 (1974).

**§ 1-180.1. Judge not to comment on verdict.** — In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200; 1967, c. 954, s. 3; 1971, c. 381, s. 12.)

**Editor's Note.** —

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in four places in the first sentence.

**Comments made by a trial judge concerning cases involving drugs** and a guilty plea involving hallucinogenic substances, coming immediately before defendant's LSD case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Brown, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

Comments made by a trial judge concerning cases involving marijuana, coming shortly before the defendant's marijuana case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

**Defendant Must Move for Continuance.** — In order to obtain the benefit of this section, a defendant must move for a continuance. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

## § 1-181. Requests for special instructions.

**A party must aptly tender, etc.** —

Requests for special instructions must be in writing and must be submitted to the trial judge before the judge's charge to the jury is begun. State v. Long, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

Where it was only after the jury retired to consider their verdict that defendant's counsel asked the judge if he could have instructions as to any previous record, the request was not timely. State v. Long, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

The fact that a limiting instruction was not repeated in the charge is not error in the absence of a request for a special instruction. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

**Failure to Sign — Discretion of Court.** —

In accord with original. See State v. Hardee, 6 N.C. App. 147, 169 S.E.2d 533 (1969).

**Request Imposes Duty on Court.** — A request for special instructions, aptly made, tendered in writing before argument and signed by counsel, has been held to impose a duty on the court to give the instructions in substance where relevant to the case. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

**This section applies equally to essential elements of the crime charged** as well as to other legal terms contained in the charge. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

**Words of Common Usage.** — It is not error for the court to fail to define and explain words of common usage and meaning to the general public. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

**This section does not apply where defendant fails to request specific instructions** but the charge as given was clear and unambiguous. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

**Applied** in Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969); State v. Ervin, 26 N.C. App. 328, 215 S.E.2d 845 (1975); State v. Scales, 28 N.C. App. 509, 221 S.E.2d 898 (1976); State v. Jackson, 30 N.C. App. 187, 226 S.E.2d 543 (1976); State v. Rogers, 32 N.C. App. 274, 231 S.E.2d 919 (1977); State v. Pharr, 32 N.C. App. 775, 233 S.E.2d 684 (1977).

**Cited** in State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

### § 1-181.1. View by jury.

**Cited** in State Hwy. Comm'n v. Rose, 31 N.C. App. 28, 228 S.E.2d 664 (1976).

### § 1-182: Repealed by Session Laws 1977, c. 776.

**Editor's Note.** —

For comment on N.C. jury charge, present practice and future proposals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

**Section Not Applicable.** — Where the judge was not requested to put his instructions in writing and read them to the jury, and he did not do so of his own will, this section does not apply. State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973).

**§ 1-183.1. Effect on counterclaim of dismissal as to plaintiff's claim.** — The granting of a motion by the defendant for judgment of dismissal as to the plaintiff's cause of action shall not amount to the taking of a voluntary dismissal on any counterclaim which the defendant was required or permitted to plead pursuant to G.S. 1A-1, Rule 13. (1959, c. 77; 1971, c. 1093, s. 3.)

**Editor's Note.** — The 1971 amendment substituted "dismissal" for "nonsuit" in two places and substituted "G.S. 1A-1, Rule 13" for "G.S. 1-137."

## SUBCHAPTER VIII. JUDGMENT.

## ARTICLE 23.

## *Judgment.*

### § 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

**A consent judgment is the contract between the parties** entered upon records with approval and sanction of the court. Redevelopment Comm'n v. Hannaford, 29 N.C. App. 1, 222 S.E.2d 752 (1976).

A consent judgment is construed as any other contract. Redevelopment Comm'n v. Hannaford, 29 N.C. App. 1, 222 S.E.2d 752 (1976).

**Default judgment by the clerk is provided for by Rule 55(b)(1)**, is subject to the jurisdictional proofs required by § 1-75.11 and is still controlled by subdivision (4) of the present section, which empowers the clerk to enter all judgments by default and default and inquiry as are authorized by Rule 55. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Stated** in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

**Cited** in Price v. Horn, 30 N.C. App. 10, 226 S.E.2d 165 (1976).

### § 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.

**Authority to Tax Counsel Fees Generally.** — With one exception, contained in this section, in eminent domain proceedings the court is authorized to tax counsel fees as a part of the costs only for an attorney appointed by the court to appeal for and protect the rights of any party in interest who is unknown or whose residence is unknown. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

**§ 1-217.2. Judgments by default to remove cloud from title to real estate validated.** — In every case where prior to the tenth day of October, 1969, a judgment by default final has been entered by the clerk of superior court of any county in this State in an action to remove cloud from title to real estate, the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628; 1971, c. 59; 1973, c. 1348, s. 1.)

**Editor's Note.** — The 1971 amendment substituted "1967" for "1956" near the beginning of this section. The amendatory act provides that it shall not apply to pending litigation.

The 1973 amendment substituted "tenth day of October, 1969" for "1st day of April, 1967" near the beginning of the section.

Session Laws 1973, c. 1348, s. 2, provides that the act shall not affect pending litigation.

**§ 1-223. Against married persons.** — In an action brought by or against a married person, judgment may be given against such married person for costs or damages or both, to be levied and collected solely out of such married person's separate estate or property. (Rev., s. 563; C. S., s. 603; 1977, c. 545.)

**Editor's Note.** — The 1977 amendment substituted "married person" for "married woman," "such married person" for "her," and "married person's separate estate or property" for "her separate estate" and deleted "in the same manner as against other persons" following "costs or damages or both."

### § 1-228. Regarded as a deed and registered.

**Cited** in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

### § 1-232. Judgment roll.

**Purpose of Introducing Judgment Roll.** — In establishing a chain of title the purpose of introducing the judgment roll is to show the commissioner's judicial authority to convey. Keller v. Hennessee, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

**Judgment Roll, Rather Than Judgment, Must Be Introduced.** — The requirement is not that the judgment be introduced, but that the judgment roll be introduced to show the judicial authority. Keller v. Hennessee, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

**Failure to Offer Judgment Roll in Evidence.** — Where a party is seeking to establish his chain of title and introduces into evidence a deed executed by a commissioner, but fails to offer in evidence the judgment roll to establish that the person named was in fact a commissioner, and had authority to convey, there is a break in the chain of title. Keller v. Hennessee, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

**§ 1-233. Docketed and indexed; held as of first day of session.** — Every judgment of the superior or district court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment, and the date, hour and minute of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior or district court, during a session of the court, and docketed during the same session, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said session, for the purpose only of establishing equality of priority as among such judgments. (Sup. Ct. Rule VIII; C. C. P., s. 252; Code, s. 433; Rev., s. 573; 1909, c. 709; C. S., s. 613; 1929, c. 183; 1943, c. 301, s. 4½; 1971, c. 268, s. 6.)

**Editor's Note. —**

The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the first sentence of the first paragraph and near the beginning of the second paragraph and substituted "session" for "term" in three places in the second paragraph.

**§ 1-234. Where and how docketed; lien.** — Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the court of any other county upon the filing with the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (C. C. P., s. 254; Code, s. 435; Rev., s. 574; C. S., s. 614; 1971, c. 268, s. 7.)

### I. IN GENERAL.

**Editor's Note. —**

The 1971 amendment, effective July 1, 1971, deleted "superior" preceding "court" in two places in the first sentence.

**§ 1-236:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

**§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.** — Each transcript of judgment from the original docket of the superior or district court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the State, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11; 1971, c. 268, s. 8.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the section.

**§ 1-244:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

**§ 1-245. Cancellation of judgments discharged through bankruptcy proceedings.** — When a referee in bankruptcy furnishes the clerk of the superior court of any county in this State a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind. (1937, c. 234, ss. 1-4; 1971, c. 268, s. 8.1.)

**Editor's Note. —**

The 1971 amendment, effective July 1, 1971, deleted the former third paragraph, providing a fee of one dollar for the filing of the instrument or certificate and the making of new notations.

### § 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.

**Reference of Section.** — This section refers solely to what an assignee is required to do in order to protect his rights as against a subsequent assignee or other subsequent creditors of or purchasers from the owner of the judgment. Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973).

## ARTICLE 26.

## *Declaratory Judgments.*

### § 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

**In General. —**

In accord with 6th paragraph in original. See City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

In accord with 7th paragraph in original. See City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

In accord with 8th paragraph in original. See Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

The Declaratory Judgment Act may be utilized to alleviate uncertainty and clarify litigation. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

**Where there can be no doubt that litigation is forthcoming, the plaintiff should not be required to await suit,** perhaps indefinitely, thereby running the risk that evidence relating to the facts will be lost. This is especially true where in the meantime plaintiff would have to maintain sufficient reserves to cover the claim. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Anticipatory Judgments Not Issued.** — The courts of this State do not issue anticipatory judgments resolving controversies that have not arisen. Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Mere Fear or Apprehension of Future Claim Not Grounds.** — A mere fear or apprehension that a claim may be asserted against a party in the future is not grounds for issuing a declaratory judgment. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Unavailability of Adequate Remedy at Law Not Necessary.** — For a court to have jurisdiction under the Declaratory Judgment Act it is not necessary for a plaintiff to show that an adequate remedy at law is unavailable. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Necessity for a Controversy. —**

In accord with 7th paragraph in original. See Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

In accord with 8th paragraph in original. See Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

In accord with 15th paragraph in original. See Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

Actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

For a court to have jurisdiction under the Declaratory Judgment Act it is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

Actual controversy is justiciable under the Declaratory Judgment Act. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the courts be convinced that the litigation appears to be unavoidable. North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

**Same — Failure of Adverse Party, etc. —** In accord with original. See North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

**Parties cannot confer jurisdiction** upon a court in declaratory judgment proceedings by consent, stipulation or agreement. City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1971).

**Jurisdiction lies where the court is convinced that litigation, sooner or later, appears to be unavoidable.** Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Plaintiff must show the existence of the conditions upon which the court's jurisdiction may be invoked.** Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**General Principles Govern Demurrers. —** Demurrers in declaratory judgment actions are controlled by the same principles applicable in other cases. Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**A demurrer is rarely an appropriate pleading, etc. —** A demurrer is rarely an appropriate pleading to a petition for declaratory judgment. However, demurrers are proper pleadings and should be sustained where the record is plain that no basis for declaratory relief exists, as where no actual controversy is alleged. Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**Only civil rights, status and relations may be determined, etc. —** A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

A declaratory judgment will not be granted when its only effect is to determine questions which properly should be decided in a criminal action. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Statute Relating to Penal Matters. —** The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971); Commodities Int'l, Inc. v. Eure, 22 N.C. App. 723, 207 S.E.2d 777 (1974).

**Constitutionality of Statute. —** It is the rule in this jurisdiction that a statute will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees. This may be done in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Construction and Validity of Statute. —** This section furnishes a proper method for determining all controversies relative to the construction and validity of a statute. City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

It is unnecessary for an assailed statute to have taken effect in order to entitle one whose rights it affects to contest it by declaratory action. However, it is well settled that the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment. City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

**Interpretation of Testamentary Trust. —** A bona fide controversy justiciable under the Declaratory Judgment Act was presented by the pleadings and stipulations in a trustee's action seeking an interpretation of a testamentary trust as to the manner of distribution of land constituting the trust corpus to testator's widow and daughter upon termination of the trust. First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

**Validity of Attempt to Sell Part of Trust Property.** — While proceedings under this Article have been given a wide latitude, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to proceedings to determine the validity of an attempt to sell part of the trust property for the benefit and preservation of a trust. Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**Challenge to Order of Board of Paroles.** — The Declaratory Judgment Act is an appropriate means whereby a prisoner who is currently serving a valid sentence for a crime committed during his parole may challenge an order of the Board of Paroles under § 148-62 providing that the remainder of the sentence upon which the parole was revoked shall be served at the completion of the sentence for the crime committed during the parole. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**The failure of a defendant who has been duly served to appear and answer** a complaint seeking a declaratory judgment constitutes admission of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions. The default admits only the allegations of the complaint and does not extend either expressly or by implication the scope of the determination sought by the plaintiff, or which could be granted by the court. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

**Construction of Insurance Contracts.** — The Declaratory Judgment Act, not applicable to claims under the Workmen's Compensation Act, is applicable to construction of insurance contracts and in determining the extent of coverage when there is controversy as to whether workmen's compensation or the insurance covers. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

**Applied** in Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969); Godfrey v. Patrick, 8 N.C. App. 510, 174 S.E.2d 674 (1970); Kale v. Forrest, 9 N.C. App. 82, 175 S.E.2d 752 (1970); Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 9 N.C. App. 193, 175 S.E.2d 741 (1970); Price v. Price, 11 N.C. App. 657, 182 S.E.2d 217 (1971); North Carolina Nat'l Bank v. Carpenter, 12 N.C. App. 19, 182 S.E.2d 3 (1971); Stephens v. North Carolina Nat'l Bank, 12 N.C. App. 323, 183 S.E.2d 287 (1971); Duplin County Bd. of Educ. v. Carr, 15 N.C. App. 690, 190 S.E.2d 653 (1972); Reeves Bros. v. Town of Rutherfordton, 282 N.C. 559, 194 S.E.2d 129 (1973); Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); Sterling Cotton Mills, Inc. v. Vaughan, 24 N.C. App. 696, 212 S.E.2d 199 (1975); Gaddy v. North Carolina Nat'l Bank, 25 N.C. App. 169, 212 S.E.2d 561 (1975); White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976); Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); Suitt Constr. Co. v. Seaman's Bank for Sav., 30 N.C. App. 155, 226 S.E.2d 408 (1976).

**Quoted** in Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Stated** in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Cited** in State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Howell v. Gentry, 8 N.C. App. 145, 174 S.E.2d 61 (1970); Reading v. Dixon, 10 N.C. App. 319, 178 S.E.2d 322 (1971); Latham v. Taylor, 10 N.C. App. 268, 178 S.E.2d 122 (1970); Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973); Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973); Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974); Myers v. Southern Nat'l Bank, 21 N.C. App. 202, 204 S.E.2d 30 (1974); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974); Houck v. Stephens, 26 N.C. App. 608, 216 S.E.2d 490 (1975).

## § 1-254. Courts given power of construction of all instruments.

**In General.** — The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Statutes.** —

A statute can be declared unconstitutional and its enforcement enjoined in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby. Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973).

**When Rights of Parties Affected by Statutes.** — When the rights of parties are affected by §§ 160A-60, 160A-291 and other statutes, to the end that they may be relieved "from uncertainty and insecurity," such parties are entitled to have the applicable statutes construed and their rights declared, and a real controversy exists between the parties. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Complaint Need Not Make Specific Reference to Statute.** — It is not error if an action instituted under the Declaratory Judgment Act fails to make specific reference to the statute in the complaint; the facts alleged determine the nature of the relief to be granted. Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

**A suit to determine the validity of a city zoning ordinance is a proper case** for a declaratory judgment. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Taylor v. City of Raleigh, 22 N.C. App. 259, 206 S.E.2d 401 (1974), aff'd, 290 N.C. 608, 227 S.E.2d 576 (1976).

A property owner having standing to attack a zoning ordinance or amendment thereof may do so in an action under this section for a declaratory judgment. Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Stutts v. Swaim, 30 N.C. App. 611, 228 S.E.2d 750, cert. denied, 291 N.C. 178, 229 S.E.2d 692 (1976).

**Owners of property in the adjoining area affected by a city zoning ordinance are parties in interest** entitled to maintain an action under this section. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

**Wills.** —

The determination of the status of the adopted children under the provisions of a will is clearly within the purpose of the Uniform Declaratory Judgment Act. Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

**A summary judgment may be entered,** when otherwise proper, upon the motion of either the plaintiff or the defendant in an action for a declaratory judgment. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

**Applied** in City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Stated** in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

## § 1-255. Who may apply for a declaration.

**Applied** in Kale v. Forrest, 9 N.C. App. 82, 175 S.E.2d 752 (1970); Palmer v. Ketner, 29 N.C. App. 187, 223 S.E.2d 913 (1976).

## § 1-256. Enumeration of declarations not exclusive.

**The purpose of this section, etc.** —

In accord with original. See Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

## § 1-260. Parties.

**"Necessary Party".** — A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**"Proper Parties".** — Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Test Whether Persons Must Be Joined.** — A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Judgment in Absence of Non-Parties Whose Interests May Be Prejudicially Affected.** — While persons not parties to a proceeding for a declaratory judgment would not be bound by the judgment, it has been held that judgment should not be entered in their absence if they have such an interest in the controversy that their rights would be prejudicially affected by the judgment. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Obtaining Declaration That Contract between Defendant and Another Party Is Invalid.** — Where the purpose of the action is to obtain a declaration that a contract between the defendant and another party is invalid, the other party, not being a party to this action, would not be legally bound by a judgment rendered here, and its rights, if any, under the contract with the defendant would be adversely affected by a declaration of rights, and if the plaintiff should prevail in the action, the defendant, though forbidden by the judgment of the court to perform its contract, might well be sued for nonperformance by the absent party; therefore, that party is a necessary party in a proceeding to declare its contract with the defendant invalid, and the court below cannot properly determine the validity of that contract without making the absent party a party to the proceeding. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Person Contracting with City Must Be Made Party to Suit on Contract Validity.** — The court cannot pass upon the validity of a city's contract where the person contracting with the city had not been made a party. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Construction of Will in Absence of Necessary Party.** — The practice as to parties may be somewhat liberalized under the Declaratory Judgment Act, but where it appears, in a case involving the construction of a will, that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Stated** in Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.** — Proceedings under this Article shall be tried at a session of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the trial division in which the proceeding is pending. If the parties do not agree upon a judge for the hearing and the proceeding is in the Superior Court Division, then upon motion of the plaintiff, the proceeding may be heard by a resident superior court judge of the district, or a superior court judge holding the courts of the district, or by any judge holding a session of superior court within the district. If the parties do not agree upon a judge and the proceeding is in the District Court Division, then upon motion of the plaintiff, the proceeding may be heard by the chief district judge or by a district judge authorized by the chief judge to hear motions and enter interlocutory orders. Such motion shall be in writing, with 10 days' notice to the defendant, and the judge designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the clerk of the court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearings in other civil actions before a judge without a jury. References to judges of the superior court in this section include emergency and special judges. (1931, c. 102, s. 10; 1971, c. 268, s. 9.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, rewrote this section.

## § 1-263. Costs.

**This section was not repealed by the enactment of § 1A-1, Rule 57.** Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972).

**Applied** in Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969).

## § 1-264. Liberal construction and administration.

**Applied** in City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

**Quoted** in Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

## § 1-267. Short title.

**Cited** in Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974).

# SUBCHAPTER IX. APPEAL.

## ARTICLE 27.

## *Appeal.*

## § 1-268. Writs of error abolished.

**Cross Reference.** — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I.

## § 1-269. Certiorari, recordari, and supersedeas.

### II. CERTIORARI.

### B. General Consideration.

**Stated** in Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

## § 1-271. Who may appeal.

**Common-Law Rule Codified under Section.** — At common law the right to appeal was limited to parties in the action who were aggrieved by the ruling of the court. This common-law rule has been codified in North Carolina under this section. Duke Power Co. v. Salisbury Zoning Bd. of Adjustment, 20 N.C. App. 730, 202 S.E.2d 607, cert. denied, 285 N.C. 235, 204 S.E.2d 22 (1974).

**And Only the "Aggrieved" May Appeal.** — In accord with 1st paragraph in original. See Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975).

In accord with 3rd paragraph in original. See Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975).

Appeal can be taken only by the aggrieved real party in interest. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

**"Party Aggrieved" Defined.** —

In accord with 4th paragraph in original. See State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

In accord with 5th paragraph in original. See State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

One may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

A party is not aggrieved unless the order complained of affects a substantial right, or in effect determines the action. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

**An administrative agency cannot be a person aggrieved by its own order,** but it may be an aggrieved party to secure judicial review of a decision of an administrative agency. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

**A legal proceeding must be prosecuted by a legal person,** whether it be a natural person, sui juris, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

Where no natural or other legal person appears as a party defendant, whether aggrieved or not aggrieved, the appeal must be dismissed for failure to comply with this section. State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236, cert. denied, 284 N.C. 121, 199 S.E.2d 663 (1973).

**Class Members Must Prosecute or Defend Class Actions.** — Even a class action must be prosecuted or defended by one or more named members of the class. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**A legal proceeding prosecuted by an aggregation of anonymous individuals,** known only to their counsel, is a phenomenon unknown to the law of this jurisdiction. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**A party has no right to appeal from a judgment entered on his own motion.** Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

**Section Applies to Proceedings Governed by Chapter 143, Article 33.** — The rule that an appeal to the appellate division may be prosecuted only at the instance of a party or parties aggrieved by the judgment of the court or tribunal from which the appeal is taken, applies with as much force to proceedings governed by Chapter 143, Article 33, as to ordinary civil cases. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**"Party Aggrieved" Defined.** —

A party is not aggrieved unless the order complained of affects a substantial right, or in effect determines the action. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

**Applied** in Days Inn of America, Inc. v. Board of Transp., 24 N.C. App. 636, 211 S.E.2d 864 (1975); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

**Quoted** in In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

**§ 1-272. Appeal from clerk to judge.** — Appeals lie to the judge of the superior court having jurisdiction, either in session or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within 10 days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (C. C. P., ss. 109, 492; Code, ss. 116, 252, 253; Rev., ss. 586, 610, 611; C. S., s. 633; 1927, c. 15; 1971, c. 381, s. 12.)

**Editor's Note.** —

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term time" in the first sentence.

**Jurisdiction When Proceeding before Clerk Is Brought before Superior Court Judge.** — The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him. However, the judge of superior court may in his discretion remand the cause to the clerk for further proceedings. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Effect of Erroneous Transfer to Superior Court.** — Even when a proceeding is erroneously transferred to the superior court, and the judge takes jurisdiction pursuant to § 1-276, he may in his discretion make new parties, allow them to answer, and hold the case for jury determination before further proceedings are held. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Judge Has Full Powers Although Proceeding Is Erroneously Transferred from Clerk.** — Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Under a strict construction of this section and § 1-273 as they affect § 7A-251,** in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

**A party cannot be aggrieved by an order dismissing someone else's appeal.** Poston v. Ragan, 14 N.C. App. 134, 187 S.E.2d 503 (1972).

**§ 1-273. Clerk to transfer issues of fact to civil issue docket.** — If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court. (C. C. P., c. 115; Code, s. 256; Rev., s. 588; C. S., s. 634; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

**Under a strict construction of this section and § 1-272 as they affect § 7A-251,** in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

**Applied** in In re Adoption of Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

**§ 1-276. Judge determines entire controversy; may recommit.**

**Judge May Determine, etc. —**

In accord with 2nd paragraph in original. See Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

When plaintiff appeals from the clerk's order to the judge, the judge is not limited to a review of the action of the clerk, but is vested with jurisdiction "to hear and determine all matters in controversy in such action," and render such judgment or order within the limits provided by law as he deems proper under all the circumstances made to appear to him. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

Though an order by the clerk was a nullity, when by appeal the matter came before the judge of the superior court, the judge did have jurisdiction to proceed to hear and determine all matters in controversy. In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

**Effect of Erroneous Transfer to Superior Court.** — Even when a proceeding is erroneously transferred to the superior court, and the judge takes jurisdiction pursuant to this section he may in his discretion make new parties, allow them to answer, and hold the case for jury determination before further proceedings are held. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Judge Has Full Powers Although Proceeding Is Erroneously Transferred from Clerk.** — Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the Commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Judge May Dismiss Action as to Defendant.** — The trial judge has full power to deny the motion to enlarge the time to file complaint and to dismiss the action as to defendant. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

**And This Discretionary Ruling Ends Action.** — Where the trial judge has the entire cause before him because of plaintiff's appeal and in the exercise of his discretion he does not permit enlargement of time for filing the complaint, and dismisses the action as to the defendant, this discretionary ruling as to enlargement of time to file complaint, in effect, ends the action. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

**Section Not Applicable to Probate Proceedings.** — Upon appeal from action taken by the clerk of the superior court, in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and the provisions of this section are not applicable. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

**§ 1-277. Appeal from superior or district court judge.** — (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P. R.; C. C. P., s. 299; Code, s. 548; Rev., s. 587; C. S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

### I. EDITOR'S NOTE.

The 1971 amendment, effective July 1, 1971, inserted "or district" and substituted "session" for "term" in subsection (a).

### II. APPEAL IN GENERAL.

#### A. General Consideration.

**Reason for This Section.** — See Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Section Not Nullified by Chapter Prescribing Rules of Civil Procedure.** — This section was not repealed or nullified by the enactment of Chapter 1A of the General Statutes prescribing the presently effective Rules of Civil Procedure. Wachovia Realty Invs. v. Housing, Inc., 292 N.C 93, 232 S.E.2d 667 (1977).

**Right of Appeal Not Restricted by Rule 54(b) Requirements.** — The General Assembly did not restrict the right of appeal provided by this section and § 7A-27(d) by engrafting Rule 54(b) requirements upon them. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

**The proper method for obtaining relief from legal errors is by appeal, etc.** —

In accord with 1st paragraph in original. See State v. McClure, 280 N.C. 288, 185 S.E.2d 693 (1972).

**Acceptance of Guilty Plea after Rejection of Plea by Previous Judge Held Not an Invalid Appeal.** — Where one superior court judge refused to accept defendant's plea of guilty of second-degree murder and continued the case on defendant's motion, the discretionary acceptance of defendant's plea of guilty of second-degree murder by another judge when the case again came on for trial was not an invalid appeal; it was not a modification, overruling or setting aside of the judgment of the first judge, the case being before the second judge de novo. State v. McClure, 280 N.C. 288, 185 S.E.2d 693 (1972).

**Applied** in Decker v. Coleman, 6 N.C. App. 102, 169 S.E.2d 487 (1969); Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871 (1972); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33 (1972); Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974); Wachovia Bank & Trust Co., N.A. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974); Sides v. Cabarrus Mem. Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975); Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); In re Metric Constructors, Inc., 31 N.C. App. 88, 228 S.E.2d 533 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, AFL-CIO, 31 N.C. App. 595, 230 S.E.2d 181 (1976).

**Cited** in GMAC v. Feder, 12 N.C. App. 696, 184 S.E.2d 383 (1971); George W. Shipp Travel Agency, Inc. v. Dunn, 20 N.C. App. 706, 202 S.E.2d 812 (1974); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

#### B. From What Decisions, Orders, etc., Appeal Lies.

**Not every order or judgment, etc.** —

In accord with original. See Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

**Appeal Even from Determination Disposing of Only Part of Lawsuit.** — This section gives any party to a lawsuit a right to an immediate appeal from every judicial determination which affects a substantial right of that party, or which constitutes a final adjudication, even when that determination disposes of only a part of the lawsuit. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

**Substantial Right May Be Affected Despite Procedures for Staying Execution of Judgment.** — The existence of the procedures under §§ 1-269, 1-289 and 1A-1, Rule 62 for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

**Interlocutory Orders.** —

In accord with 7th paragraph of original. See Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

In accord with 8th paragraph in original. See Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, AFL-CIO, 31 N.C. App. 595, 230 S.E.2d 181 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

In accord with 9th paragraph of original. See Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

In accord with 10th paragraph in original. See Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

In accord with 12th paragraph in original. See North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

In accord with 13th paragraph in original. See Setzer v. Annas, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); Lundy Packing Co. v. Amalgamated Meat Cutters, AFL-CIO, 31 N.C. App. 595, 230 S.E.2d 181 (1976).

It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error shall not be corrected at once, and before the final hearing, that an appeal lies before final judgment. Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

Strict construction of the rule against allowing appeal from an interlocutory order of the trial court serves the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

This section and § 7A-27 in effect provide that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975); Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656 (1976).

This section serves as a roadblock to appeals from interlocutory orders which do not deprive the appellant of a substantial right. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**"Substantial" Defined.** — The word "substantial" is defined in Black's Law Dictionary, 4th Ed. (1968) as "of real worth and importance; of considerable value, valuable." Setzer v. Annas, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975).

It has been held that the right is substantial only where appellant would lose if the ruling or order is not reviewed before final judgment. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

**If a motion to dismiss were allowed and the action dismissed,** plaintiff would have a right of immediate appeal, because further proceedings would be precluded by the order. Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

**Refusal to Dismiss Action.** —

In accord with 1st paragraph in original. See Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

**Denial of Motion to Strike Answer and Counterclaim.** — An order which denies plaintiff's motion to strike defendant's answer and counterclaim does not affect a substantial right of plaintiff, nor does it in effect determine the action, and therefore no appeal lies from that order. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

**Appeal from Order Granting Summary Judgment.** — The order granting summary judgment denies plaintiff a jury trial on the issue of its claim against the bank and, in effect, determines the claim in favor of the bank. Thus the order affects a substantial right and is appealable under §§ 1-277 and 7A-27. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

**Appeal from Denial of Motion for Summary Judgment.** — Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment, and in case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of certiorari is available. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

To allow an appeal from a denial of a motion for summary judgment would open the flood gate of fragmentary appeals and cause a delay in administering justice. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Denial of Motion for Directed Verdict.** — The scope of the appellate court's jurisdiction on appeal following an order denying motion for directed verdict following a mistrial is found in this section and in Appellate Court Rule 4. Samia v. A.J. Ballard, Jr. Tire & Oil Co., 25 N.C. App. 601, 214 S.E.2d 222 (1975).

**Appeal from Preliminary Injunction.** — On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

**Order to Submit to Psychiatric Examination in Custody Case.** — An order that the parties and the child submit to a psychiatric examination prior to final determination on the question of custody is interlocutory but does not deprive plaintiff of a substantial right which she might lose if the order is not reviewed before a final determination of custody. Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656 (1976).

**Prayer for Judgment Continued.** — When the prayer for judgment is continued there is no judgment — only a motion or prayer by the prosecuting officer for judgment. When the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal. Punishment having been once inflicted, the court has exhausted its power and cannot thereafter impose additional punishment. State v. Cheek, 31 N.C. App. 379, 229 S.E.2d 227 (1976).

**Order Prohibiting Taking of Deposition of Plaintiff's Expert.** — The order of the superior court, prohibiting the taking of the deposition of the plaintiff's expert metallurgist by the defendant effectively precludes the defendant from introducing evidence of the "readings" concerning the hardness of the metal obtained by the tests which the expert made. Thus, the order affects a substantial right of the defendant and is appealable. Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

**Order Dismissing Charge of Indirect Civil Contempt.** — An appeal lies under subsection (a) to review an order dismissing a charge of indirect civil contempt where the order affects a substantial right claimed by the appellant. Piedmont Equip. Co. v. Weant, 30 N.C. App. 191, 226 S.E.2d 688 (1976).

**Review of Judgment under Rule 54(b).** — This section is not such an express authorization of review of a final judgment upon multiple claims or involving multiple parties as referred to in the second sentence of Rule 54(b). Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974).

### C. What Supreme Court Will Consider.

**When Appeal from Interlocutory Order Not Premature.** — An appeal from an interlocutory order will not be considered premature if a substantial right of the appellant would be adversely affected by continuance of an injunction in effect pending final determination of the case. Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 178 S.E.2d 781 (1971).

Appeal from an interlocutory order may be considered by appellate courts if a substantial right of the appellant would be affected adversely by continuing the effectiveness of the injunction pending trial on the merits. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

## III. APPEAL AS TO PARTICULAR SUBJECTS.

### A. Costs.

**Order Staying Collection of Deposition Costs.** — There is no right or injury to justify an immediate appeal from a discretionary order staying collection of deposition costs where the moving party has clearly expressed an intention to institute an action in which the same depositions will be material and where the nonmoving party incurred those costs three months after filing responsive motions and over one month after taking an affidavit which revealed insufficiency of service of process and then waited an additional six months for a hearing upon a motion to dismiss for insufficient service. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

### D. Injunction.

**Preliminary Injunction.** — An order granting or refusing a preliminary injunction is an interlocutory order governed by the requirements of this section. Gunkel v. Kimbrell, 29 N.C. App. 586, 225 S.E.2d 127 (1976).

On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

### G. Appeals as to Miscellaneous Subjects.

**Joinder and restraining orders** are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

**The addition of parties where they are not necessary** is a matter within the trial court's discretion, and the judge's order refusing to join additional parties is not ordinarily reviewable. Henredon Furn. Indus., Inc. v. Southern Ry., 27 N.C. App. 331, 219 S.E.2d 238 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 697 (1976).

## § 1-278. Interlocutory orders reviewed on appeal from judgment.

**Cited** in Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

**§ 1-279. Manner and time for taking appeal in civil action or special proceeding.** — (a) From Judgments and Orders Rendered in Session. — Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by:

(1) Giving oral notice of appeal at trial, or at any hearing of a timely motion under G.S. 1A-1, Rule 59, for a new trial or to alter or amend a judgment, or under G.S. 1A-1, Rule 50, for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) Filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c).

(b) From Judgments and Orders Rendered out of Session. — Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c).

(c) Time When Taken by Written Notice. — If not taken by oral notice as provided in subsection (a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subsection, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under G.S. 1A-1, Rule 50(b), for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under G.S. 1A-1, Rule 52(b), to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under G.S. 1A-1, Rule 59, to alter or amend a judgment; (iv) a motion under G.S. 1A-1, Rule 59, for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) Content and Service of Notice of Appeal. — The content and mode of service of the notice of appeal required by this section are as prescribed by the rules of appellate procedure. (C. C. P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C. S., s. 641; 1971, c. 381, s. 12; c. 989; 1975, c. 391, s. 3.)

**Editor's Note.** — The first 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in two places.

The second 1971 amendment, effective Oct. 1, 1971, added the proviso.

The 1975 amendment rewrote this section, which formerly related to the time for taking an appeal, and provided that execution should not be suspended until the giving of the required undertaking.

Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

**Appellate Rule 3(a) is almost identical to subsection (a) of this section,** and both are jurisdictional. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

**The provisions of this section and § 1-280 are jurisdictional, etc.** —

In accord with 1st paragraph in original. See State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236, cert. denied, 284 N.C. 121, 199 S.E.2d 663 (1973).

**Appeal to Be Dismissed Where Timely Notice Not Given or Properly Served.** — Where the notice of appeal is dated and filed more than ten days after the rendition of a default judgment, and no notice of appeal is served on the plaintiff, the appeal from the entry of the judgment should be dismissed because timely notice was not given or properly served. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Where the appeal is taken more than 10 days after the "entry" of judgment and the time within which appeal can be taken is not otherwise tolled as provided in this section and Appellate Rule 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Brooks v. Matthews, 29 N.C. App. 614, 225 S.E.2d 159 (1976).

**Applied** in Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); State v. Harold, 27 N.C. App. 588, 219 S.E.2d 528 (1975); Clark v. Wallace, 27 N.C. App. 589, 219 S.E.2d 501 (1975).

**§ 1-280:** Repealed by Session Laws 1975, c. 391, s. 4, effective July 1, 1975.

**Editor's Note.** — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

**§ 1-281. Appeals from judgments not in session.** — When appeals are taken from judgments of the clerk or judge not made in session, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C. S., s. 642(a); 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term time."

**§ 1-282:** Repealed by Session Laws 1975, c. 391, s. 7, effective July 1, 1975.

**Editor's Note.** — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

**§ 1-283. Trial judge empowered to settle record on appeal; effect of leaving office or of disability.** — Except as provided in this section, only the judge of superior court or of district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. A judge retains power to settle a record on appeal notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order. Proceedings for judicial settlement when the judge empowered by this section to settle the record on appeal is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the State shall be as provided by the rules of appellate procedure. (C. C. P., s. 301; Code, s. 550; 1889, c. 161; Rev., s. 591; 1907, c. 312; C. S., s. 644; 1971, c. 381, s. 12; 1975, c. 391, s. 8.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the first sentence of the last paragraph.

The 1975 amendment rewrote this section, which formerly related to custody of convicted persons not released pending appeal.

Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

**Applied** in State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

**Cited** in Lewter v. Herndon, 13 N.C. App. 242, 184 S.E.2d 926 (1971).

### § 1-284: Repealed by Session Laws 1975, c. 391, s. 9, effective July 1, 1975.

**Editor's Note.** — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

**§ 1-285. Undertaking on appeal; filing; waiver.** — To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred fifty dollars ($250.00), to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. (C. C. P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C. S., s. 646; 1969, c. 44, s. 5; 1975, c. 391, s. 1.)

#### I. GENERAL CONSIDERATION.

**Editor's Note.** —

The 1975 amendment deleted the former last two sentences of the section, which provided that no appeal should be dismissed for failure to file an undertaking or make a deposit if the undertaking was filed or the deposit made before the record was transmitted by the clerk of the superior court to the appellate division, and which authorized the appellate division, for good cause shown, to allow the undertaking to be filed or the deposit made after the record in the case had been transmitted.

Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

### § 1-287: Repealed by Session Laws 1975, c. 391, s. 2, effective July 1, 1975.

**Editor's Note.** — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

### § 1-287.1: Repealed by Session Laws 1975, c. 391, s. 10, effective July 1, 1975.

**Editor's Note.** — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities

Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

**§ 1-288. Appeals in forma pauperis; clerk's fees.** — When any party to a civil action tried and determined in the superior or district court at the time of trial desires an appeal from the judgment rendered in the action to the Appellate Division, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said court to make an order allowing said party to appeal from the judgment to the Appellate Division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the session at which the judgment was rendered or within 10 days from the expiration by law of the session, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said court that he has examined the affiant's case, and is of opinion that the decision of the court, in said action, is contrary to law. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge or the clerk has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Appellate Division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C. S., s. 649; 1937, c. 89; 1951, c. 837, s. 7; 1969, c. 44, s. 8; 1971, c. 268, s. 12.)

**Editor's Note.** —

The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the first sentence, substituted "session" for "term" in two places in the second sentence, deleted "superior" preceding "court" in four places in the first, second and third sentences and deleted "of the superior court" following "judge" and "clerk" in the last sentence. The amendment also deleted the former fourth sentence, requiring the clerk to pass upon and grant or deny a request for appeal within ten days after the expiration of the term, and the former fifth sentence, relating to the clerk's fees where the appellant furnishes two true and correctly typewritten copies of the records on appeal.

For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

**This section is applicable to appeals in juvenile proceedings** tried in the district court. Compliance with its terms is necessary to entitle juveniles to an order allowing them to appeal in forma pauperis. The requirements are mandatory and must be observed. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKiever v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970).

**Stated** in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

**§ 1-289. Undertaking to stay execution on money judgment.**

**Stated** in Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

**§ 1-291. How judgment directing conveyance stayed.**

**Cited** in Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

### § 1-294. Scope of stay; security limited for fiduciaries.

**Authority of Lower Court Terminated.** — An appeal removes a cause from the trial court, which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court. Upton v. Upton, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

Trial court does not have jurisdiction to conduct contempt proceedings while appeal is pending, because, under this section, all proceedings below are stayed; therefore any order finding a defendant in contempt is void, at least until appeal is perfected. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

An appeal takes the case out of the jurisdiction of the trial court. Carpenter v. Carpenter, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

Pending an appeal the trial judge is functus officio. Carpenter v. Carpenter, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

**But Appeal Does Not Authorize Violation of Order.** — While an appeal stayed contempt proceedings until the validity of the order was determined, taking the appeal did not authorize a violation of the order. If the order is upheld by the appellate court, the violation, including any violation that occurred while the order was pending on appeal, may be inquired into when the case is remanded to the superior court. Upton v. Upton, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

**Applied** in Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977).

**§ 1-298. Procedure after determination of appeal.** — In civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first session after the receipt of the certificate from the Appellate Division. (1887, c. 192, s. 2; Rev., s. 1526; C. S., s. 659; 1969, c. 44, s. 11; 1971, c. 268, s. 13.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the first sentence and substituted "session" for "term" in the first and second sentences.

**§§ 1-299 to 1-301:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

## SUBCHAPTER X. EXECUTION.

### Article 28.

### *Execution.*

### § 1-302. Judgment enforced by execution.

**Applied** in Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

**§ 1-305. Clerk to issue, in six weeks; penalty.** — Subject to the provisions of G.S. 1A-1 (Rule 62), the clerk of superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars ($100.00) for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (1850, c. 17, ss. 1, 2, 3; R. C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C. S., s. 666; 1953, c. 470; 1959, c. 1295; 1973, c. 1070, s. 1.)

**Editor's Note.** — The 1973 amendment added "Subject to the provisions of G.S. 1A-1 (Rule 62)" at the beginning of the section and deleted "the" preceding "superior court" near the beginning of the section.

### § 1-306. Enforcement as of course.

**Judgment Directing Payment of Alimony.** — The statute of limitations does not apply to a judgment directing the payment of alimony. Morse v. Zatkiewiez, 5 N.C. App. 242, 168 S.E.2d 219 (1969).

**§ 1-310. When dated and returnable.** — Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than 90 days from said date, and no executions against property shall issue until 10 days after entry of judgment. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code, s. 449; 1903, c. 544; Rev., s. 624; C. S., s. 672; 1927, c. 110; 1931, c. 172; 1953, c. 697; 1971, c. 381, s. 12; 1973, c. 1070, s. 2; 1977, c. 74, s. 1.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

The 1973 amendment substituted "10 days after rendition of judgment" for "the end of the session during which judgment was rendered" at the end of the section.

The 1977 amendment, effective July 1, 1977, substituted "entry" for "rendition" near the end of the section.

Session Laws 1977, ch. 74, s. 5, provides: "This act shall not affect pending litigation."

**§ 1-311. Against the person.** — If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the Article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. Such findings of fact shall include a finding that the defendant either (i) is about to flee the jurisdiction to avoid paying his creditors, (ii) has concealed or diverted assets in fraud of his creditors, or (iii) will do so unless immediately detained. If defendant appears at the hearing on the debt and the judge has reason to believe that the defendant is indigent, he shall inform the defendant that if he is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. If defendant appears at the hearing on the debt and the judge provisionally concludes he is indigent, counsel should be appointed immediately. (C. C. P., s. 260; Code, s. 447; 1891, c. 541, s. 2; Rev., s. 625; C. S., s. 673; 1947, c. 781; 1977, c. 649, s. 1.)

**Editor's Note.** — The 1977 amendment added the fourth through sixth sentences.

**Constitutionality.** — As a matter of procedural due process, the statutorily prescribed "finding of facts establishing the right to execution against the person" under this section embrace not only findings with respect to the wrong of the debtor upon his creditor but in addition a finding of probable cause to believe that he has committed or will commit further wrongs in order to cheat his creditors. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977). Decided prior to the 1977 amendment to this section.

Before a capias of execution against the body of a person may issue there must be findings of fact sufficient to support a conclusion of probable cause to believe that the debtor is about to flee the jurisdiction or has concealed or diverted assets, or unless immediately detained will probably do so. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977). Decided prior to the 1977 amendment to this section.

It is not irrational for the General Assembly to view execution against the body (which may issue only upon a judgment, an express finding of fraud and a writ of fieri facias returned nulla bona) as a step both necessary and reasonably calculated to compel disclosure of possibly hidden assets. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977). Decided prior to the 1977 amendment to this section.

An equal protection attack against this section was without merit because the thrust of this section is simply against all debtors who have defrauded or committed other torts under § 1-410 — some of whom may later prove to be indigent and some of whom are well off and are concealing substantial assets. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977). Decided prior to the 1977 amendment to this section.

**Cited** in Rouse v. Wheeler, 17 N.C. App. 422, 194 S.E.2d 555 (1973).

**§ 1-313. Form of execution.** — The execution must be directed to the sheriff, or to the coroner when the sheriff is a party to or interested in the action. In those counties where the office of coroner is abolished, or is vacant, and in which process is required to be executed on the sheriff, the authority to execute such process shall be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to execute the same. The execution must also be subscribed by the clerk of the court, and must refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

(1) Against Property — No Lien on Personal Property until Levy. — If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

(2) Against Property in Hands of Personal Representative. — If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

(3) Against the Person. — If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is released or discharged according to law. The execution shall include a statement that if the

defendant is an indigent person he is entitled to services of counsel, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer.

(4) For Delivery of Specific Property. — If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

(5) For Purchase Money of Land. — If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C. S., s. 675; 1971, c. 653, s. 2; 1977, c. 649, s. 2.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, rewrote the opening paragraph, inserting the provisions as to execution in counties where the office of coroner is abolished and making other changes.

The 1977 amendment in subdivision (3), inserted "released or" in the first sentence and added the second sentence.

**Manner of Execution.** — See opinion of Attorney General to Mr. C.E. Drum, Jr., 42 N.C.A.G. 312 (1973).

**Stated** in Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

### § 1-315. Property liable to sale under execution; bill of sale.

**Passive Trust.** — Where the trust is passive, the property is subject to sale under execution against the judgment debtor. Fishel & Taylor v. Grifton United Methodist Church, 22 N.C. App. 647, 207 S.E.2d 330 (1974).

**§ 1-320. Summary remedy on forthcoming bond.** — If the condition of such bond be broken, the sheriff or other officer, on giving 10 days' previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before the district court, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court. (1822, c. 1141, P. R.; R. C., c. 45, s. 23; Code, s. 465; Rev., s. 635; C. S., s. 681; 1971, c. 268, s. 14.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "the district court" for "a justice of the peace" near the middle of the section and deleted "or justice" at the end of the section.

**§ 1-321. Entry of returns on judgment docket; penalty.** — When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last-mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars ($100.00) nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding session of the superior court of his county. (1871-2, c. 74, s. 2; 1881, c. 75; Code, s. 445; Rev., s. 636; C. S., s. 683; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the end of the last sentence.

**§ 1-322. Cost of keeping livestock; officer's account.** — The court shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (1807, c. 731, P. R.; R. C., c. 45, ss. 25, 26; Code, ss. 466, 467; Rev., ss. 637, 638; C. S., s. 684; 1971, c. 268, s. 15.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "or justice" following "court" near the beginning of the first sentence and "justice or" preceding "court" near the middle of the second sentence.

## ARTICLE 29A.

## *Judicial Sales.*

### Part 1. General Provisions.

**§ 1-339.1. Definitions.** — (a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale
  a. Contained in a mortgage, deed of trust, or conditional sale contract, or

b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or

(2) A resale ordered with respect to any sale described in subsection (a) (1), where such original sale was not held under a court order, or

(3) An execution sale, or

(4) A sale ordered in a criminal action, or

(5) A tax foreclosure sale, or

(6) A sale made pursuant to Article 4 of Chapter 35 of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or

(7) A sale made in the course of liquidation of a bank pursuant to G.S. 53-20, or

(8) A sale made in the course of liquidation of an insurance company pursuant to Article 17A of Chapter 58 of the General Statutes, or

(9) Any other sale the procedure for which is specially provided by any statute other than this Article.

(b) As hereafter used in this Article, "sale" means a judicial sale. (1949, c. 719, s. 1; 1971, c. 268, s. 16.)

**Editor's Note.** —

The 1971 amendment, effective July 1, 1971, inserted "or district" in the opening paragraph of subsection (a).

For comment entitled, "Attacking the 'Forfeiture as Liquidated Damages' Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

**Cited** in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

### § 1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.

(b) The procedure prescribed by this Article applies to all sales ordered by a judge of the superior or district court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property, and not inconsistently with G.S. 1-339.27(a) and G.S. 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1; 1971, c. 268, ss. 17, 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of subsection (b) and deleted "the superior" following "judge or clerk of" in subsection (c).

As subsection (a) was not affected by the amendment, it is not set out.

**Refusal to File Order of Confirmation.** — The clerk is not authorized under this section or any other statute to refuse to file and maintain in her records a valid order of confirmation. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**§ 1-339.3A. Judge or clerk may order public or private sale.** — The judge or clerk of court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of court having jurisdiction is hereby validated as to the order that such sale be a private sale. (1955, c. 74; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in the first and second sentences.

**§ 1-339.8. Public sale of separate tracts in different counties.** — (a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior or district court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk's own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G.S. 1-339.27.

(c) The sale, and each subsequent resale, of each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(1971, c. 268, ss. 18, 19.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of subsection (a) and deleted "the superior" following "judge or clerk of" near the middle of subsection (c).

As the rest of the section was not changed by the amendment, only subsections (a) and (c) are set out.

**§ 1-339.9. Sale as a whole or in parts.** — (a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of court having jurisdiction may direct specifically

(1) That it be sold as a whole, or
(2) That it be sold in designated parts, or
(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**§ 1-339.10. Bond of person holding sale.** — (a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and
(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**§ 1-339.11. Compensation of person holding sale.** — (a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale. (1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

## Part 2. Procedure for Public Sales of Real and Personal Property.

### § 1-339.14. Public sale; judge's approval of clerk's order of sale.

**Cited** in In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

### § 1-339.18. Public sale; posting notice of sale of personal property.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of court pursuant to the provisions of G.S. 1-339.13(b) (2). (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

**§ 1-339.19. Public sale; exception; perishable property.** — If personal property to be sold at public sale is determined by the judge or clerk of court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in the first sentence.

### § 1-339.20. Public sale; postponement of sale.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" near the middle of subsection (d). As the rest of the section was not changed by the amendment, only subsection (d) is set out.

**§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.** — (a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sales of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G.S. 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of court having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in the first sentence of subsection (a) and in subsection (c).

**§ 1-339.25. Public sale; upset bid on real property; compliance bond.**

**After the time provided by this section for the placing of an upset bid has expired** and after the order of confirmation has been signed by the clerk and approved by a superior court judge, the clerk has no authority to accept an upset bid, and in the absence of findings of fraud, mistake or collusion, a superior court judge has no authority to set aside the order of confirmation and to order a resale of the property. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.** — When real property is sold at public sale in parts, as provided by G.S. 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of."

**§ 1-339.28. Public sale; confirmation of sale.** — (a) No public sale of real property may be consummated until confirmed as follows:

(1) If a public sale is ordered by a judge of the Superior Court Division, it may thereafter be confirmed by a resident superior court judge of the district or a superior court judge regularly holding the courts of the district.

(2) If a public sale is ordered by a judge of the District Court Division, it may thereafter be confirmed by the judge so ordering, the chief district judge, or any district judge authorized by the chief judge to hear motions and enter interlocutory orders.

(3) If a public sale is ordered by a clerk of court, it may thereafter be confirmed by the clerk of court so ordering.

(1971, c. 268, s. 20.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, rewrote subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**Before confirmation, the prospective purchaser has no vested interest** in the property. His bid is but an offer subject to the approval of the court. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**Upon confirmation the sale becomes final** and the vested interest of the purchaser is not lightly to be put aside. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

After confirmation of a judicial sale, the purchaser becomes the equitable owner of the property, and the sale may then be set aside only for mistake, fraud or collusion. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**The court in exercising its sound discretion may reject the bid** at any time before confirmation. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**§ 1-339.29. Public sale; real property; deed; order for possession.** — (a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(c) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsections (a) and (c).

As the rest of the section was not changed by the amendment, only subsections (a) and (c) are set out.

**§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.** — An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this Article unless so directed by the judge or clerk of court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" near the end of the section.

## Part 3. Procedure for Private Sales of Real and Personal Property.

**§ 1-339.33. Private sale; order of sale.** — Whenever a private sale is ordered, the order of sale shall

(1) Designate the person authorized to make the sale;
(2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
(3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
(4) Prescribe such terms of sale as the judge or clerk of court ordering the sale deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subdivision (4).

**§ 1-339.38. Private sale; real property; deed; order for possession.** — (a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsections (a) and (b).

**§ 1-339.39. Private sale; personal property; delivery; bill of sale.** — Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G.S. 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" near the middle of the section.

## ARTICLE 29B.

## *Execution Sales.*

### Part 1. General Provisions.

**§ 1-339.41. Definitions.**

**The execution sale authorized by § 105-375 is analogous** to an execution sale conducted under the authority of this section. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903, cert. granted, 289 N.C. 614, 223 S.E.2d 392 (1976).

## Part 2. Procedure for Sale.

### § 1-339.54. Notice to judgment debtor of sale of real property.

**Effect of Noncompliance. —** Notice requirement for execution sales is directory only, and failure to comply with the notice requirement prior to an execution sale does not render the sale invalid or void with respect to an innocent purchaser who lacks knowledge of the irregularity. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903, cert. granted, 289 N.C. 614, 223 S.E.2d 392 (1976).

**§ 1-339.71. Special proceeding to determine ownership of surplus.** — (a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 1-339.70 or G.S. 105-374(q)(6), to determine who is entitled thereto. (1973, c. 1446, s. 19.)

**Editor's Note. —** The 1973 amendment substituted "G.S. 105-374(q)(6)" for "G.S. 105-391" near the end of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

## Article 30.

## *Betterments.*

### § 1-340. Petition by claimant; execution suspended; issues found.

**The right to betterments is a doctrine, etc. —** The right to betterments is based upon the obvious principle of justice that the owner of land has no just claim to anything but the land itself, and fair compensation for damage and loss of rent. If the claimant, acting under an erroneous but honest and reasonable belief that he is the owner, makes valuable and permanent improvements, the true owner should not take them without compensation. This section undertakes to declare and establish the equities between them. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598 (1976).

**What Claimant Must Show. —** To be entitled to compensation for betterments under this section, defendant must show that he made permanent improvements on the property under a bona fide, reasonable belief of good title. Hackett v. Hackett, 31 N.C. App. 217, 228 S.E.2d 758 (1976).

**Color of Title — Notice Required. —** Constructive notice from the record of the existence of a paramount title or interest does not deprive an occupying claimant of the right to be reimbursed for his improvements on being ejected from the premises. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598 (1976).

**Same — Reasonable Belief. —** The good faith which will entitle a claimant to compensation for betterments means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598 (1976).

There must be shown not only an honest and bona fide belief in petitioner's title, but he must satisfy the jury, also, that he had good reason for such belief; and it is for the jury to judge of the reasonableness of such belief, based upon the entire evidence. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598 (1976).

## Article 31.

## *Supplemental Proceedings.*

**§ 1-352. Execution unsatisfied, debtor ordered to answer.** — When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 1; Rev., s. 667; C. S., s. 711; 1971, c. 268, s. 21.)

**Editor's Note.** —

The 1971 amendment, effective July 1, 1971, deleted "justice's" preceding "judgment is filed" near the middle of the section.

**Property held by the entirety is not subject to execution to satisfy judgments against one spouse.** Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

**But Proceeds of Entirety Property May Be Applied against Debts of Husband.** — Proceeds of entirety property are the property of the husband as against the wife and such proceeds may be applied against debts of the husband alone. Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

The income from rental property held by the entirety is not protected from attachment to satisfy the debts of the husband merely because it is derived from entirety property. Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

**Order to Chairman Sufficient to Bring Board before Court.** — Order of the court in the supplemental proceeding directing the chairman of the board of trustees of the judgment-debtor church to appear and answer was sufficient to bring the board of trustees before the court and make the board of trustees subject to its jurisdiction. Fishel & Taylor v. Grifton United Methodist Church, 22 N.C. App. 647, 207 S.E.2d 330 (1974).

**Cited** in Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

**§ 1-352.1. Interrogatories to discover assets.** — As an additional method of discovering assets of a judgment debtor, the judgment creditor may prepare and serve on the judgment debtor written interrogatories concerning his property, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution. Such written interrogatories shall be fully answered under oath by the judgment debtor within 30 days of service on the judgment debtor, and the answer shall be filed by the judgment debtor with the clerk of the superior court wherein the original judgment is docketed. Copy of said answer shall be served upon the party submitting said written interrogatories, in the manner provided by the Rules of Civil Procedure.

Interrogatories may relate to any matters which can be inquired into under G.S. 1-352, and the debtor may object to any interrogatories that are deemed improper, but the making of objections shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment or oppression.

Upon failure of the judgment debtor to fully answer the written interrogatories the judgment creditor may petition the court for an order requiring the judgment debtor to fully answer, which order shall be served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure, fixing the time within which the judgment debtor can answer the interrogatories, and further providing as an alternative that the judgment debtor may appear and answer concerning his property before such court or judge, at a time and place specified in said order.

Any person who disobeys an order of the court may be punished by the judge as for a contempt under the provisions of G.S. 1-368. (1971, c. 529, s. 1.)

**Editor's Note.** — Session Laws 1971, c. 529, s. 3, makes the act effective Oct. 1, 1971.

The Rules of Civil Procedure are found in § 1A-1.

**§ 1-352.2. Additional method of discovering assets.** — In addition to the other provisions of this Article and as an additional method of discovering assets of a judgment debtor the clerk of the court or a judge of the court in the county wherein the original judgment is docketed, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution, upon motion of the judgment creditor showing good cause therefor, may:

(1) Order the judgment debtor, his agent or anyone having possession or control of property or records of or pertaining to the judgment debtor, to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, all tax records, letters, objects or tangible things, not privileged, constituting property, or being evidence of property, of the judgment debtor and which are in his possession and custody, or subject to his control; or

(2) Order the judgment debtor or anyone acting for or on his behalf to permit entry upon designated land or other property, real or personal, in his possession or control or subject to his control for the purpose of inspecting, measuring, surveying, appraising, copying, or photographing the property of the judgment debtor.

(3) Prior notice of the motion, together with a copy thereof, shall be served on the judgment debtor as provided by the Rules of Civil Procedure. Upon the hearing, the order entered shall specify the time, place and manner for compliance therewith and may prescribe such terms and conditions as are just.

(4) Any person who shall fail to comply with an order entered pursuant to this section may be punished as for a contempt under the provisions of G.S. 1-368. (1971, c. 711, s. 1.)

**Editor's Note.** — Session Laws 1971, c. 711, s. 2, makes the act effective Oct. 1, 1971.

The Rules of Civil Procedure are found in § 1A-1.

**§ 1-362. Debtor's property ordered sold.**

**Editor's Note.** — For note on protection of debtor's rights, see 48 N.C.L. Rev. 164 (1969).

**§ 1-363. Receiver appointed.**

**Verified pleadings essentially operate as affidavits** under this section and should be construed accordingly. Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

**§ 1-364. Filing and record of appointment; property vests in receiver.** — When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript of judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (C. C. P., s. 270; 1870-1, c. 245; Code, s. 495; Rev., s. 680; C. S., s. 723; 1971, c. 268, s. 22.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "of" for "from justice's" between "transcript" and "judgment" near the middle of the first sentence.

## SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

### ARTICLE 32.

### *Property Exempt from Execution.*

**§ 1-370. Conveyed homestead not exempt.** — The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by anyone for him, but when conveyed by him in the mode authorized by the Constitution, Article X, § 2(4), the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (1905, c. 111; Rev., s. 686; C. S., s. 729; 1977, c. 2.)

**Editor's Note.** — The 1977 amendment substituted "Article X, § 2(4)" for "article X, § 8" in the first sentence.

**§ 1-371. Sheriff to summon and swear appraisers.** — Before levying upon the real estate of any resident of this State who is entitled to a homestead under this Article, and the Constitution of this State, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be 18 years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Alamance, Ashe, Bertie, Brunswick, Buncombe, Cabarrus, Caldwell, Camden, Caswell, Chatham, Chowan, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, Moore, New Hanover, Onslow, Pasquotank, Perquimans, Pitt, Randolph, Rockingham, Rowan, Sampson, Scotland, Vance, Wayne, Wilson. (1868-9, c. 137, s. 2; Code, s. 502; 1893, c. 58; Rev., s. 687; C. S., s. 730; 1931, c. 58; 1933, cc. 37, 147; 1955, c. 20; 1967, c. 202; 1971, c. 1231, s. 1.)

**Editor's Note.** —
The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

**§ 1-381. Exceptions to valuation and allotment; procedure.** — If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within 10 days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return. Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next session thereof as other civil actions, and such issue joined has precedence over all other issues at that session. The sheriffs shall not sell the excess until after the determination of said action. The 10 days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (1883, c. 357; Code, s. 519; 1887, c. 272, s. 2; Rev., s. 699; C. S., s. 740; 1971, c. 381, s. 12.)

**Editor's Note.** —
The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in two places in the second sentence.

**§ 1-382. Revaluation demanded; jury verdict; commissioners; report.** — When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallotment is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next session of the court, when it shall be heard by the court upon exceptions thereto. (1885, c. 347; Rev., s. 700; C. S., s. 741; 1971, c. 268, s. 22.1; c. 381, s. 12.)

**Editor's Note.** — The first 1971 amendment, effective July 1, 1971, deleted "or a justice of the peace" following "sworn by the sheriff" in the last sentence.

The second 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the end of the last sentence.

**§ 1-384. Set aside for fraud, or irregularity.** — An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court during session, as hereinbefore provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value. (Code, s. 523; Rev., s. 702; C. S., s. 743; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "during session" for "at term time."

**§ 1-385. Return registered; original or copy evidence.** — When the homestead and personal property exemption is decided by the court during session the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Code, s. 524; Rev., s. 703; C. S., s. 744; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "during session" for "at term time."

**§ 1-386. Allotted on petition of owner.** — When any resident of this State desires to take the benefit of the homestead and personal property exemption as guaranteed by Article X of the State Constitution, or by this Article, such resident, his agent or attorney, must apply to the clerk of superior court of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the clerk, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars ($1,000.00) in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this Chapter, not exceeding in value the sum of five hundred dollars ($500.00), and make, sign and return a descriptive list thereof to the register of deeds. (1868-9, c. 137, ss. 7, 8; Code, ss. 511, 512; Rev., ss. 697, 704; C. S., s. 745; 1971, c. 268, s. 23.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "the clerk of superior court" for "a justice of the peace" in the first sentence and "clerk" for "justice" in the second sentence.

**§ 1-387. Advertisement of petition; time of hearing.** — When a person entitled to a homestead and personal property exemption files the petition before a clerk of superior court to have the same laid off and set apart under the preceding sections, the clerk shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than 12 months from the day of making advertisement as above required. (1868-9, c. 137, s. 11; Code, s. 515; Rev., s. 705; C. S., s. 746; 1971, c. 268, s. 24.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "clerk of superior court" for "justice of the peace" and "clerk" for "justice" in the first sentence.

**§ 1-389. Allotted to surviving spouse or minor children on death of homesteader.** — If a person entitled to a homestead exemption dies without the homestead having been set apart, the surviving spouse, if the decedent leaves no children under the age of 18 years, or the decedent's child or children under the age of 18 years, may proceed to have the homestead exemption laid off by petition. If the surviving spouse or children have failed to have the exemption set apart in the manner provided, then in an action brought by the personal representatives of the decedent to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested persons to set apart to such surviving spouse, child or children a homestead exemption under metes and bounds in the land of the decedent. The three persons so appointed shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (1868-9, c. 137, s. 10; Code, s. 514; 1893, c. 332; Rev., s. 707; C. S., s. 748; 1971, c. 1231, s. 1; 1977, c. 81, s. 1.)

**Editor's Note.** —

The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

The 1977 amendment substituted "the surviving spouse, if the decedent leaves no children under the age of 18 years, or the decedent's" for "his widow, if he leaves no children, or his" and deleted "if he leaves such" preceding "may proceed" in the first sentence, substituted "surviving spouse" for "widow" in two places in the second sentence, substituted "the personal representatives of the decedent" for "his personal representatives" and "three disinterested persons" for "three disinterested freeholders" in the second sentence, and substituted "three persons so appointed" for "freeholders" in the third sentence.

Session Laws 1977, c. 81, s. 2, provides: "This act shall become effective 30 days after certification by the State Board of Elections that an amendment to the Constitution of North Carolina rewriting Article X, Section 2(3) and Section 2(4) to permit a surviving spouse of either sex to receive the benefits of the homestead exemption unless the owner left surviving a minor child or children has been approved by the people of the State." Such an amendment to N.C. Const., Art. X, § 2(3) and (4) was proposed by Session Laws 1977, c. 80, and was adopted by vote of the people at the general election held Nov. 8, 1977.

**§ 1-392. Forms.** — The following forms must be substantially followed in proceedings under this Article:

[No. 1]

Appraisers' Return.

When the homestead is valued at one thousand dollars or less,
and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of . . . . . . . . . . . . . . . Township, . . . . . . . . . . . . . . . . County, by C. D., Sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of . . . . . . . . . . and . . . . . . . . . . . . is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this . . . . . . . . day of . . . . . . . . . . . . ., 19 . . . . .

O. K. . . . . . . . . . . . . [L. S.]
L. M. . . . . . . . . . . . . [L. S.]
R. S. . . . . . . . . . . . . [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. . . . . . . . . . . . . . . ., (Sheriff or Constable).

### [No. 2]

### Petition for Homestead Before the Clerk of Superior Court

. . . . . . . . . . . . . . . . . . . . County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

### [No. 3]

### Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of . . . . . . . . . . . . . Township, . . . . . . . . . . . . . . County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit: . . . . . . . . . . . . . . . which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this . . . . . . . . day of . . . . . . . . . . . . ., 19 . . . .

O. K. . . . . . . . . . . . [L. S.]
L. M. . . . . . . . . . . . [L. S.]
R. S. . . . . . . . . . . . [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. ................, (Sheriff or Constable).

[No. 4]

Certificate of Qualification to Be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the ............ exemption of the said A. B., under an execution in favor of X. Y., this ............ day of ............, 19 .....

C. D. ............(Sheriff).

[No. 5]

Minute on Execution Docket.

X ........ vs. ........ Y ................

vs.

A ................ B ................

Execution issued ................., 19 .....

Homestead appraised and set off and return made ................., 19 .....

(Code, s. 524; Rev., s. 709; C. S., s. 751; 1971, c. 268, s. 25.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "the Clerk of Superior Court" for "a Justice of the Peace" and eliminated "Before ......., J.P." in the heading of Form No. 2.

## SUBCHAPTER XII. SPECIAL PROCEEDINGS.

### ARTICLE 33.

### *Special Proceedings.*

**§ 1-394. Contested special proceedings; commencement; summons.** — Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within 10 days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4(a) of the Rules of Civil Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within 30 days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C. S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; c. 237, s. 3; 1939, c. 49, s. 2; c. 143; 1951, c. 783; 1961, c. 363; 1967, c. 954, s. 3; 1971, c. 1093, s. 17.)

**Editor's Note.** —

The 1971 amendment deleted "whether by the sheriff or by publication" following "service" near the beginning of the last sentence.

**Quoted** in Housing Auth. v. Farabee, 284 N.C. 242, 200 S.E.2d 12 (1973).

**Stated** in Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

**Cited** in In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

**§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.** — In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during session upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (1903, c. 566; Rev., s. 717; C. S., s. 758; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the end of the first sentence.

**Applied** in Wall v. Wall, 24 N.C. App. 725, 212 S.E.2d 238 (1975).

### § 1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.

**Persons Affected Must Present Ex Parte Proceeding to Clerk.** — This section applies only when all persons to be affected present an ex parte proceeding to the clerk and he acts summarily. In that event all parties must sign the petition, or must sign and file with the clerk (1) a written application to be made petitioners or (2) a written authorization to the attorney, before the clerk may make any order or decree prejudicing their rights. In re Johnson, 9 N.C. App. 102, 176 S.E.2d 31 (1970), aff'd, 277 N.C. 688, 178 S.E.2d 470 (1971).

**Written Authorization Required Only When Attorney Signs for Petitioner.** — This section only requires written authorization when the attorney signs for a petitioner in the original petition. It does not apply where the original petition is signed by the parties themselves. In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971).

**§ 1-403. Orders signed by judge.** — Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of session, must be authenticated by his signature. (1868-9, c. 93, s. 5; 1872-3, c. 100; Code, s. 288; Rev., s. 722; C. S., s. 762; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

### § 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.

**Allowance of Commissioners' Fee by Clerk of Superior Court.** — See opinion of Attorney General to Mr. Jacob C. Taylor, Clerk of Superior Court, Halifax, N.C., 1/6/70.

# SUBCHAPTER XIII. PROVISIONAL REMEDIES.

## ARTICLE 34.

## *Arrest and Bail.*

### § 1-409. Arrest only as herein prescribed.

**Cited** in Earnhardt v. Earnhardt, 9 N.C. App. 213, 175 S.E.2d 744 (1970); Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977).

### § 1-410. In what cases arrest allowed.

**Applied** in Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702 (1975).

**Cited** in Rouse v. Wheeler, 17 N.C. App. 422, 194 S.E.2d 555 (1973); Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977).

**§ 1-413. Issuance and form of order.** — The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. The order shall include a statement that if the person arrested is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and preliminary release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. (C. C. P., s. 153; Code, s. 295; Rev., s. 731; C. S., s. 771; 1977, c. 649, s. 3.)

**Editor's Note.** — The 1977 amendment added the fourth sentence.

### § 1-417. Motion to vacate order; jury trial.

**Surety on bail has no standing to object** to the arrest or summary judgment against the defendant. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

**§ 1-422. Notice of justification; new bail.** — On the receipt of notice of exception to the bail, the sheriff or defendant may, within 10 days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court or judge, at a specified time and place; the time to be not less than five nor more than 10 days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C. C. P., s. 163; Code, s. 305; Rev., s. 741; C. S., s. 780; 1971, c. 268, s. 26.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "justice of the peace" following "court," in the first sentence.

**§ 1-424. Justification of bail.** — For the purpose of justification, each of the bail shall attend before the court or judge, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, or judge, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C. C. P., s. 165; Code, s. 307; Rev., s. 742; C. S., s. 782; 1971, c. 268, s. 27.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "or a justice of the peace" following "court or judge" near the beginning of the first sentence and substituted "or judge" for "judge or justice of the peace" near the end of the first sentence.

**§ 1-425. Allowance of bail.** — If the court or judge finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (C. C. P., s. 166; Code, s. 308; Rev., s. 743; C. S., s. 783; 1971, c. 268, s. 28.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "or judge" for "judge or justice of the peace" near the beginning of the section.

**§ 1-428. Bail substituted for deposit.** — If money is deposited, as provided in G.S. 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the court or judge shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C. C. P., s. 169; Code, s. 311; Rev., s. 746; C. S., s. 786; 1971, c. 268, s. 29.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "court or judge" for "judge, court or justice of the peace" near the beginning of the second sentence.

### § 1-433. Bail exonerated.

**Defendant may be legally discharged in several ways,** including an order under § 1-417 to vacate the arrest or a decision on the merits, and such discharge exonerates the bail. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

### § 1-436. Proceedings against bail by motion.

**Surety is liable for any breach of bail bond obligations.** Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

**Surety on bail has no standing to object to arrest or summary judgment against defendant.** Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

**Grounds for Defense by Surety on Bail.** — Surety on bail has no right other than to defend an action on the bonds on grounds of legal discharge, death, surrender or imprisonment of the principal. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

## ARTICLE 35.

## *Attachment.*

### Part 1. General Provisions.

### § 1-440.1. Nature of attachment.

**This Article protects legitimate interests of creditors** in narrowly defined situations where the absence of such a remedy would have substantial, deleterious effects on the creditor himself and the commercial credit system as a whole. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

This Article affords the debtor the most extensive safeguards possible and minimizes both the possibility of a wrongful or arbitrary deprivation of the debtor's property interest and the harm to the debtor as a result of the ex parte issuance of the writ of attachment. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Narrow nature of this statute ensures that the creditor's interests advanced or protected by this procedure are legitimate. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Protection of Due Process Clause. —** Attachment of real property is a substantial deprivation of a significant property interest subject to the protection of the due process clause. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Notice and Opportunity for Hearing. —** Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) does not require that a defendant be given notice and the opportunity for a hearing prior to the issuance by the clerk or judge of an order of attachment pursuant to this section and §§ 1-440.2, 1-440.14. Opinion of Attorney General to Mr. Clarence Kluttz, 43 N.C.A.G. 168 (1973).

**Absence of conflicting interests in the attached property** does not automatically mandate notice and hearing prior to attachment. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Applied** in Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

**Cited** in Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

### § 1-440.2. Actions in which attachment may be had.

**Applied** in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Cited** in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

### § 1-440.3. Grounds for attachment.

**Impact of this section and § 1-440.11** is either to (1) afford the court in the main action quasi in rem jurisdiction so as to bring the defendants' property under the jurisdiction of the State court or (2) bring property within the custody of the court which would otherwise be unavailable for satisfaction of an ultimate judgment in a principal suit because of assignment or removal by the debtor. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Section 1-440.11(2)(b), in conjunction with this section, manifests a statutory procedure in which a prejudgment writ will be issued in only exceptional circumstances on a rigorous showing that such circumstances exist. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Postponement of Notice and Hearing. —** Circumstances contemplated in subdivisions (1) through (4) are extraordinary situations, justifying postponement of notice and hearing. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

This section and § 1-440.11 in stating when and under what conditions an order of attachment may be issued manifest a definite procedure for granting the writ, a procedure which does not entail opportunity for prior notice and hearing. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Confinement of remedy** is certainly an important, initial step in ensuring against wrongful or abusive use of the process by a creditor. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Subdivision (5) is restricted to circumstances in which creditor is in immediate danger** that the debtor will destroy or alienate the property sought to be attached. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Applied** in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

**§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.** — (a) An order of attachment may be issued by

(1) The clerk of the court in which the action has been, or is being, commenced, or by

(2) A judge of the appropriate trial division, as authorized in subsection (b) of this section.

(b) An order of attachment issued by a judge may be issued as follows:

(1) If the action has been or is being commenced in the Superior Court Division, a resident superior court judge of the district, or a judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, in session or in vacation, and within or without the district. Any other judge holding a session of superior court in the county may issue the order in open court.

(2) If the action has been or is being commenced in the District Court Division, the presiding judge, the chief district judge, or any district judge authorized by the chief to hear motions and enter interlocutory orders may issue the order in open court or in chambers, in session or in vacation.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by G.S. 1-440.10 and the affidavit required by G.S. 1-440.11 to be filed promptly with the clerk of the court of the county in which the action is pending. (1947, c. 693, s. 1; 1971, c. 268, s. 30.)

**Editor's Note.** —

The 1971 amendment, effective July 1, 1971, rewrote subsections (a) and (b) and deleted "superior" preceding "court" near the end of subsection (c).

**Issuance of attachment by clerk is consistent with due process.** Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

The issuance of the attachment order by the clerk is consistent with due process since the clerk is a judicial officer and not a mere administrative functionary. Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267, cert. denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

**Since clerk is a judicial officer and not a mere administrative functionary.** Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**§ 1-440.7. Time within which service of summons or service by publication must be had.** — (a) When an order of attachment is issued before the summons is served.

(1) If personal service within the State is to be had, such personal service must be had within 30 days after the issuance of the order of attachment:

(2) If such personal service within the State is not to be had,

a. Service of the summons outside the State, in the manner provided by Rule 4(j)(9)a or b of the Rules of Civil Procedure, must be had within 30 days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by Rule 4(j)(9)c of the Rules of Civil Procedure unless the defendant appears in the action or unless personal service is had on him within the State.

(1971, c. 1093, ss. 14, 15.)

**Editor's Note.** —

The 1971 amendment substituted "Rule 4(j)(9)" for "Rule (j)(1)" in subdivisions (a)(2)a and (a)(2)b.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**Applied** in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

### § 1-440.9. Authority of court to fix procedural details.

**Court Has Authority to Dissolve Attachment after Order Not Carried Out.** — This Article does not specifically authorize the court to dissolve or dismiss an attachment when a plaintiff fails to carry out the court's order to increase the bond, but pursuant to the general authorization of this section to fix all procedural details not specified elsewhere, and in aid of its own jurisdiction over the matter, we think the court has authority to dissolve an attachment after the court's lawful order has not been carried out. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**Applied** in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

## Part 2. Procedure to Secure Attachment.

### § 1-440.10. Bond for attachment.

**Plaintiffs Not Entitled to Jury Trial on Question of Increasing Bond.** — Plaintiffs in attachment were not entitled to a jury trial on the question of increasing the bond required by this section, the size of a plaintiff's bond not being within the "issues" envisioned by § 1-440.36(c). Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**A judge of the superior court has authority to require plaintiffs in attachment to increase their bond** or have their attachment dismissed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**And he has authority to dismiss the attachment** by a second order when plaintiffs failed to post additional bond within the time fixed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

### § 1-440.11. Affidavit for attachment; amendment.

#### I. IN GENERAL.

**Impact of this section and § 1-440.3** is either to (1) afford the court in the main action quasi in rem jurisdiction so as to bring the defendants' property under the jurisdiction of the State court or (2) bring property within the custody of the court which would otherwise be unavailable for satisfaction of an ultimate judgment in a principal suit because of assignment or removal by the debtor. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Applied** in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

### § 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.

**Levy Made under Original Order 41 Days after Issuance Is Invalid.** — Where the sheriff's levy was under the original order for attachment and was 41 days after its issuance, it was insufficient to constitute a valid levy, and there was no error in the entry of the order to vacate it. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

## Part 3. Execution of Order of Attachment; Garnishment.

### § 1-440.16. Sheriff's return.

**Levy under an order of attachment must be made within ten days of the issuance of the order.** Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

**Levy Made under Original Order 41 Days after Issuance Is Invalid.** — Where the sheriff's levy was under the original order for attachment and was 41 days after its issuance, it was insufficient to constitute a valid levy, and there was no error in the entry of the order to vacate it. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

## § 1-440.21. Nature of garnishment.

**Quoted** in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

## § 1-440.22. Issuance of summons to garnishee.

**Quoted** in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

## § 1-440.23. Form of summons to garnishee.

**Cited** in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

## § 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.

**Implied Agent.** — It is of no import that a servee was not expressly designated to be an agent for service of process and thus must be termed an implied agent. While there have been no cases under this section dealing with service of process upon an implied agent, an analogy can be made to § 1A-1, Rule 4(j)(6)a. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Although the title of purchasing agent is not specifically enumerated in this section and § 1-440.26(a), this does not preclude the classification of such an agent within one of the listed categories. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

## § 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.

**Cases Decided under Former § 1-97(1) Still Pertinent.** — Because the language used in former § 1-97(1) was the same as now appears in subsection (a) of this section, cases decided under former § 1-97(1) are still pertinent. Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

**Purchasing Agent May Be "Managing Agent".** — Although a purchasing agent does not conveniently fit, at least by nomenclature, into the listed categories of subsection (a) of this section, a careful analysis of his background and responsibilities may manifest sufficient reason why he should, under the facts of the case, be termed a "managing agent." These facts include: his age; his business experience; his full-time employment status; his past experience with garnishment papers and proceedings; the confidence which was expressed in his abilities, etc. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Although the title of purchasing agent is not specifically enumerated in § 1-440.25 and subsection (a) of this section, this does not preclude the classification of such an agent within one of the listed categories. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

**Test.** — Where defendant is not the president or the head of the corporation, nor is he secretary, cashier, treasurer, or director, the question then becomes: Is he such an agent, regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

### § 1-440.27. Failure of garnishee to appear.

**Quoted** in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

## Part 5. Miscellaneous Procedure Pending Final Judgment.

### § 1-440.36. Dissolution of the order of attachment.

**Section Affords Hearing and Judicial Determination.** — In combination with the § 1-440.11 requirement that the facts supporting the allegation of intent to defraud be stated in the affidavit, this section affords a meaningful hearing and judicial determination of the attachment at an early stage. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**Jurisdiction of Judge of Superior Court.** — On motion to dissolve an attachment, the judge of superior court has concurrent jurisdiction with the clerk of superior court to determine the matter; and consequently the judge is not limited to determining whether or not there was competent evidence to support the findings of the clerk but can consider the evidence de novo and hear evidence not before the clerk. Hiscox v. Shea, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

**Failure of Judge to Make Findings of Fact.** — On appeal to the superior court from an order of the clerk dissolving an attachment, failure of the judge to make findings of fact in his order which vacated and overruled the clerk's order is erroneous. Hiscox v. Shea, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

**Plaintiffs Not Entitled to Jury Trial on Question of Increasing Bond.** — Plaintiffs in attachment were not entitled to a jury trial on the question of increasing the bond required by § 1-440.10, the size of a plaintiff's bond not being within the "issues" envisioned by subsection (c). Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**Applied** in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

### § 1-440.37. Modification of the order of attachment.

**Applied** in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

### § 1-440.39. Discharge of attachment upon giving bond.

**Applied** in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

**Cited** in Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

### § 1-440.40. Defendant's objection to bond or surety.

**A judge of the superior court has authority to require plaintiffs in attachment to increase their bond** or have their attachment dismissed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**And he has authority to dismiss the attachment** by a special order when plaintiffs failed to post additional bond within the time fixed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

## Part 6. Procedure after Judgment.

### § 1-440.46. When plaintiff prevails in principal action.

**Judgment against Defendant and Surety Proper.** — Where the bond signed by the surety was for the benefit of the plaintiff, and the judgment did not exceed the amount of the bond, the trial judge correctly gave judgment against the defendant and the surety. Beck Distrib. Corp. v. Imported Parts, Inc., 10 N.C. App. 737, 179 S.E.2d 793 (1971).

**Cited** in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

## Part 7. Attachments in Justice of the Peace Courts.

**§§ 1-440.47 to 1-440.56:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

## Part 8. Attachment in Other Inferior Courts.

**§ 1-440.57:** Repealed by Sessions Laws 1971, c. 268, s. 34, effective July 1, 1971.

## ARTICLE 36.

## *Claim and Delivery.*

**§ 1-472. Claim for delivery of personal property.** — The plaintiff in an action to recover the possession of personal property may claim the immediate delivery of the property as provided in this Article at any time before the judgment in the principal action. (C. C. P., s. 176; Code, s. 321; Rev., s. 790; C. S., s. 830; 1977, c. 753.)

**Editor's Note.** —
The 1977 amendment, effective July 1, 1977, deleted "at the time of issuing the summons or at any time before answer" following "personal property may" and added "at any time before the judgment in the principal action" to the end.

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

**§ 1-474. Order of seizure and delivery to plaintiff.** — The clerk of court may, upon notice and hearing as provided in G.S. 1-474.1, and upon the giving by the plaintiff of the undertaking prescribed in G.S. 1-475, require the sheriff of the county where the property claimed is located to take said property from the defendant and deliver it to the plaintiff. The act of the clerk in issuing or refusing to issue the order to the sheriff is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction of the principal action. (C. C. P., s. 178; Code, s. 323; Rev., s. 792; C. S., s. 832; 1973, c. 472, s. 1.)

**Editor's Note.** — The 1973 amendment rewrote the first sentence and added the second sentence.

**Questions raised by defendants involving substantial rights** can be decided only when the case is heard on its merits. Wachovia Bank & Trust Co., N.A. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975).

**Stated** in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

**§ 1-474.1. Notice of hearing; waiver; permissible form of notice and waiver.** — (a) The clerk of court, upon the request of the plaintiff, shall issue a notice to the defendant setting a time and place for a hearing before the clerk which shall not be less than 10 days from the date of service of said notice upon the defendant. The notice shall be served on the defendant in any manner provided by the Rules of Civil Procedure for the service of summons. Upon the request of the plaintiff the notice shall contain an order enjoining the defendant from willfully disposing of the property in any manner, from removing or permitting the removal of the property from the State of North Carolina, or from causing or permitting willful damage or destruction of the property. If in a trial on the merits it is determined that the plaintiff was entitled to the possession of the property, and the defendant after service of notice of the hearing shall have willfully disposed of the property, removed or permitted the removal of the property from the State of North Carolina, or caused or permitted its willful damage or destruction, the defendant may be found in contempt of court and may be fined or imprisoned by the court as provided by law.

(b) Waiver of the rights to notice and hearing shall not be permitted except as set forth herein. At any time subsequent to service of the notice of hearing provided in subsection (a), the clerk of court, upon the request of the plaintiff, shall mail to the defendant at his last known address a form by which the defendant may waive his right to the hearing. Upon the return of the form to the clerk of court, bearing the signature of the defendant and that of a witness to the defendant's signature (which witness shall not be a party to the action or an agent or employee of a party to the action), the clerk in his discretion may dispense with the necessity of a hearing and may proceed to issue the order of seizure prescribed by G.S. 1-474.

(c) In addition to any other forms substantially complying with the requirements of the preceding subsections, form (1) below may be used to give the notice provided for in subsection (a) above and form (2) below may be used to waive the hearing as provided in subsection (b) above:

(1) READ THIS NOTICE.

WARNING: DO NOT WILLFULLY DISPOSE OF, REMOVE OR PERMIT THE REMOVAL FROM THE STATE OF NORTH CAROLINA, OR CAUSE OR PERMIT WILLFUL DAMAGE OR DESTRUCTION OF THE PROPERTY DESCRIBED BELOW BECAUSE YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE FINED OR IMPRISONED.

To: . . . . . . . . . . . . . . . . . . . . . . . . . . . . . (Defendant).

If you want to present reasons why you should not have the property described below taken from you, then you should appear at a hearing to be held before the undersigned clerk of court at . . . . . . . o'clock . . . . .M. on the . . . . . . . . . . . . . day of . . . . . . . . . . . . ., 19. . . ., at the . . . . . . . . . . . . . . . . . . . . . . . . . County Courthouse because . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . (Plaintiff) has sworn that you wrongfully hold the following property and that he is entitled to it:

(Description of Property)

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

At the hearing the plaintiff will present evidence, and you are allowed to present evidence. You may bring an attorney to this hearing. Upon the basis of the evidence presented, the clerk will decide whether or not to issue an order directing the sheriff to take the property until a trial on the merits is held. You are hereby ORDERED:

a. Not to willfully dispose of the property;

b. Not to remove or permit its removal from the State of North Carolina; and

c. Not to cause or permit its damage or destruction.

If you fail to comply with this order, and it is finally determined that the plaintiff is entitled to the possession of the property, you may be guilty of contempt of court and may be fined or imprisoned as provided by law.

If you have any questions about the hearing, you may contact an attorney or the clerk of court prior to the hearing.

(Certificate of Service)

(2) VOLUNTARY WAIVER OF HEARING.

To . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . (Defendant)

You have been served with a notice that a hearing will be held before the undersigned clerk of court at . . . . . . . . . . . . o'clock . . . . . M. on the . . . . . . . . . . . . . day of . . . . . . . . . . . . . . . . . ., 19 . . . . . ., at the . . . . . . . . . . . . . . . . . . . . . . . . County Courthouse to determine if . . . . . . . . . . . . . . . . . . . . . . . . . . . . . (Plaintiff) is entitled to the possession of the following described property until a trial on the merits is held

(Description of Property)

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

If you do not wish to object to the plaintiff's right to the possession of this property until a trial on the merits is held, you may waive your right to the hearing by signing the statement below, having your signature witnessed by any person who is not a party or an agent or employee of a party to this action and returning it to the undersigned clerk of court by mail or in person prior to the date set for the hearing.

. . . . . . . . . . . . . . . . . . . . . . . .
Clerk of Superior Court

I, . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ., do hereby voluntarily waive and relinquish my right to the hearing described above.

. . . . . . . . . . . . . . . . . . . . . . . .
Defendant

Witness:
(Name)
. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
(Address)
. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

(1973, c. 472, s. 2.)

**Editor's Note.** — The Rules of Civil Procedure are found in § 1A-1.

## § 1-475. Plaintiff's undertaking.

**Editor's Note.** — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

**Cited** in Wachovia Bank & Trust Co., N.A. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974).

**§ 1-479. Qualification and justification of defendant's sureties.** — The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court or judge, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C. C. P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C. S., s. 837; 1971, c. 268, s. 30.1.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "or judge" for "a judge or justice of the peace" in the second sentence.

**Clerks of Court May Take Justification of Defendant's Sureties; Magistrates Have Not Succeeded to the Power of Justice of Peace to Take Such Justification.** — See opinion of Attorney General to Honorable Robert J. Pleasants, 41 N.C.A.G. 628 (1971).

**§ 1-482. Property claimed by third person; proceedings.** — When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least 10 days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. However, this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property pending the trial of the issue. (1793, c. 389, s. 3, P. R.; R. C., c. 7, s. 10; C. C. P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C. S., s. 840; 1933, c. 131; 1971, c. 268, s. 30.2.)

**Editor's Note.** —

The 1971 amendment, effective July 1, 1971, deleted a former fourth sentence and a portion of the last sentence, both relating to proceedings in the court of a justice of the peace. The amendment also substituted "However," for "Provided that," at the beginning of the last sentence.

**§ 1-484.1. Remedy not exclusive.** — The provisions of this Article shall not be construed to preclude the use of attachment or any other ancillary remedy (upon the terms and subject to the conditions provided by law for the exercise thereof) simultaneously with the remedy of claim and delivery. (1973, c. 472, s. 2.1.)

## ARTICLE 37.

## *Injunction.*

**§ 1-485. When preliminary injunction issued.** — A preliminary injunction may be issued by order in accordance with the provisions of this Article. The order may be made by any judge of the superior court or any judge of the district court authorized to hear in-chambers matters in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

(3) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (C. C. P., ss. 188, 189; Code, ss. 334, 338; Rev., s. 806; C. S., s. 843; 1967, c. 954, s. 3; 1973, c. 66, s. 1.)

### I. GENERAL CONSIDERATION.

**Editor's Note.** —

The 1973 amendment inserted "or any judge of the district court authorized to hear in-chambers matters" in the introductory paragraph.

**This section is constitutional.** Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974).

**References to Superior Court Deemed to Refer Also to District Court.** — Following the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the superior court are deemed to refer also to the district court. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

**Notice and Hearing Required.** — A preliminary injunction, unlike a temporary restraining order, requires notice to the adverse party and a hearing. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

**Court May Consider Affidavits.** — Both before and after the adoption of the new Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of this section does not prohibit this. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of this section for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

**Applied** in River Dev. Corp. v. Parker Tree Farms, Inc., 12 N.C. App. 1, 182 S.E.2d 211 (1971); Smith's Cycles, Inc. v. American Honda Motor Co., 26 N.C. App. 76, 214 S.E.2d 785 (1975).

**Cited** in Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970).

### II. NATURE.

**The remedy authorized by this section, etc.** —

Under North Carolina statutes and procedure, an injunction is not a cause of action or a lawsuit in and of itself, but is a remedy which is ancillary to a pending suit. Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S. Ct. 1576, 39 L.Ed.2d 880 (1974).

Where no complaint or summons has been filed, no action has been instituted and therefore there is no pending action to which the injunction can be ancillary. Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S. Ct. 1576, 39 L.Ed.2d 880 (1974).

**Preliminary injunction serves as an equitable policing measure** to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

### III. GROUNDS OF RELIEF.

#### C. Application of Section.

**When Temporary Injunction Granted. —** In accord with original. See Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976).

**Obstruction of Easement. —** A preliminary mandatory injunction may be issued when an easement into one's property has been obstructed. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

**§ 1-493. What judges have jurisdiction. —** All judges of the superior court and judges of the district court authorized to hear in-chambers matters have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings pending in their respective divisions. (1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; Code, s. 335; Rev., s. 814; C. S., s. 851; 1971, c. 381, s. 12; 1973, c. 66, s. 2.)

**Editor's Note. —** The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the beginning of the former second sentence.

The 1973 amendment added "All," inserted "and judges of the district court authorized to hear in-chambers matters" and added "pending in their respective divisions" in the first sentence. The amendment also eliminated the former second sentence, relating to the granting of an injunction or issuing of a restraining order by a judge holding a special session.

**References to Superior Court Deemed to Refer Also to District Court. —** Following the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the superior court were deemed to refer also to the district court. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969) (decided prior to the 1973 amendment of this section).

**§ 1-494. Before what judge returnable. —** All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within 20 days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within 10 days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction.

All restraining orders and injunctions granted by any judge of the district court shall be made returnable before the judge granting such order or injunction or before the chief district judge or a district judge authorized to hear in-chambers matters in the district where the civil action is pending, within 20 days from the date of the order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application on the date set, or within 10 days thereafter, any district judge of the district authorized to hear in-chambers matters may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C. S., s. 852; 1963, c. 1143; 1973, c. 66, s. 3.)

**Editor's Note. —** The 1973 amendment added the second paragraph.

**§ 1-495. Stipulation as to judge to hear.** — By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge of the appropriate trial division designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued. (1883, c. 33; Code, s. 337; Rev., s. 816; C. S., s. 853; 1973, c. 66, s. 4.)

**Editor's Note.** — The 1973 amendment inserted "of the appropriate trial division" near the beginning of the section and deleted, at the end of the section, "the necessary postage or expressage money to be furnished to the judge."

**§ 1-498. Application to extend, modify, or vacate; before whom heard.** — Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the superior court division may be heard by the judge having jurisdiction if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district.

Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the district court division may be heard by the district judge who made the original order or by the chief district judge or by a district judge of the district authorized to hear in-chambers matters. (C. C. P., s. 195; Code, s. 344; 1905, c. 26; Rev., s. 819; C. S., s. 856; 1967, c. 954, s. 3; 1973, c. 66, s. 5.)

**Editor's Note.** —
The 1973 amendment inserted "issued in the superior court division" in the first paragraph and added the second paragraph.

**§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.** — Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in session, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the appellate division. (1921, c. 58; C. S., s. 858(a); 1969, c. 44, s. 12; 1971, c. 381, s. 12.)

**Editor's Note.** —
The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the beginning of the first sentence.

**In determining on appeal whether the lower court erred** in ordering a temporary restraining order vacated prior to a hearing of the matter on the merits, the Supreme Court is not bound by the findings of fact, or lack of such findings, by the lower court, but may review the evidence and make its own findings of fact. Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976).

**Matters to Be Considered Upon Final Hearing.** — Upon the final hearing on the merits of a complaint seeking a temporary restraining order, neither the Supreme Court's findings of fact upon appeal of an order vacating a temporary restraining order nor the findings or conclusions of the Court of Appeals, or of the trial judge at the hearing upon the order to show cause why the restraining order should not be continued, are to be considered by the superior court. Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976).

**Cited** in Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970); Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

## ARTICLE 38.

## *Receivers.*

### Part 1. Receivers Generally.

**§ 1-501. What judge appoints.** — Any judge of the superior or district court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions, except only a judge of the Superior Court Division has jurisdiction to appoint receivers of corporations. (C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 846; C. S., s. 859; 1971, c. 268, s. 31.)

**Cross References.** —

The first two cross references in this note in the Replacement Volume should be deleted. — Ed. note.

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the section and added the exception clause at the end of the section.

**Cited** in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

**§ 1-502. In what cases appointed.** — A receiver may be appointed —

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

(2) After judgment, to carry the judgment into effect.

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

(4) In cases provided in G.S. 1-507.1 and in like cases, of the property within this State of foreign corporations.

(5) In cases wherein restitution is sought for violations of G.S. 75-1.1.

The provisions of G.S. 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder. (C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 847; C. S., s. 860; 1955, c. 1371, s. 3; 1973, c. 614, s. 3.)

**Editor's Note.** — The 1973 amendment added subdivision (5). The amendatory act provides that it shall not apply to pending litigation.

**Applied** in Stegall Milling Co. v. Hettiger, 27 N.C. App. 76, 217 S.E.2d 767 (1975).

**Cited** in Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

**§ 1-505. Sale of property in hands of receiver.** — In a case pending in the Superior Court Division in which a receiver has been appointed, the resident superior court judge or a superior court judge regularly holding the courts of the district shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed. In a case pending in the District Court Division in which a receiver has been appointed, the chief district judge or a district judge designated by the chief district judge to hear motions and enter interlocutory orders shall have the power and authority to order a sale of any property, real or personal, in the hands of a duly appointed receiver. Sales of property authorized by this section shall be upon such terms as appear to be to the best interests of the creditors affected by the receivership. The procedure for such sales shall be as provided in Article 29A of Chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1; 1971, c. 268, s. 32.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, rewrote the first sentence and added the second and third sentences.

**§ 1-507. Validation of sales made outside county of action.**

**Cited** in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

## Part 2. Receivers of Corporations.

**§ 1-507.7. Report on claims to court; exceptions and jury trial.** — It is the duty of the receiver to report to the session of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within 10 days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least 20 days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (1901, c. 2, s. 83; Rev., s. 1230; C. S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the beginning of the first sentence.

**§ 1-507.8. Property sold pending litigation.** — When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least 10 days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular session of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C. S.,s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the last sentence.

## SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

### ARTICLE 41.

### *Quo Warranto.*

**§ 1-514. Writs of sci. fa. and quo warranto abolished.**

**Editor's Note.** —
For article "Some Aspects of the Criminal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

**§ 1-521. Trials expedited.** — All actions to try the title or right to any State, county or municipal office shall stand for trial at the next session of court after the summons and complaint have been served for 30 days, regardless of whether issues were joined more than 10 days before the session; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (1874-5, c. 173; Code, s. 616; 1901, c. 42; Rev., s. 833; C. S., s. 876; 1947, c. 781; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" twice in the first sentence.

## ARTICLE 42.

## *Waste.*

**§ 1-534. For and against whom action lies.** — In all cases of waste, an action lies in the appropriate trial division of the General Court of Justice at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R. C., c. 116, s. 1; Code, s. 625; Rev., s. 854; C. S., s. 889; 1971, c. 268, s. 33.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "appropriate trial division of the General Court of Justice" for "superior court."

## ARTICLE 43.

## *Nuisance and Other Wrongs.*

**§ 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.** — (a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(b) If any person, firm or corporation shall willfully and intentionally set on fire, or cause to be set on fire, in any manner whatever, any valuable wood, timber or trees on the lands of another, such person, firm or corporation shall be liable to the owner of said lands for double the value of such wood, timber or trees damaged or destroyed thereby.

(c) Any person, firm or corporation cutting timber under contract and incurring damages as provided in subsection (a) of this section as a result of a misrepresentation of property lines by the party letting the contract shall be entitled to reimbursement from the party letting the contract for damages incurred. (1945, c. 837; 1955, c. 594; 1971, c. 119; 1977, c. 859.)

**Editor's Note.** —

The 1971 amendment added the second paragraph of subsection (a). The amendatory act provides that it shall not affect pending litigation.

The 1977 amendment deleted the former second paragraph of subsection (a), which pertained to the recovery by the bona fide owner of a reasonable attorney's fee, reasonable surveying fee and reasonable cost of an appraisal of the damages sustained by him, redesignated former subsection (b) as subsection (c) and added present subsection (b).

**Construction of Section.** — Strict construction of this section requires that everything be excluded from the operation of the section which does not come within the scope of the language used, taking the words in their natural and ordinary meaning. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

**Owner May Recover Value Added by Intentional Wrongdoer.** — If the trespasser is an intentional and knowing wrongdoer, the owner of the land may recover the enhanced value of the timber added to it by the labor of the trespasser. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

**But This Section and the Enhanced Value Theory Are Mutually Exclusive.** — The common-law theory of enhanced value and the statutory remedy of double value are mutually exclusive. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

**And Section May Not Be Applied to Enhanced Value.** — A strict interpretation of this section would not permit its application to an enhanced value situation. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

While this section provides that the wrongdoer shall be liable to the owner of the land for double the value of the wood or trees injured, cut or removed, the statute does not indicate when the value should be doubled. To collect double the enhanced value plaintiffs would be proceeding under the common-law theory of an action in trover to recover the value of the goods in their enhanced condition and at the same time proceeding under the statutory remedy. The two remedies are exclusive and are not to be combined to provide an additional remedy. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

**Plaintiff Must Establish Ownership.** — In order to recover penalties under this section plaintiff must establish that he is the owner of the land from which the timber was cut. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

In order to sustain an action for permanent damages to the freehold, or to the ownership interest, such as an action for unlawful cutting of timber, plaintiff must allege and show that he is the owner of the land from which the timber was cut. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Defendants' denial of plaintiff's allegation of title and trespass placed the burden on plaintiff of establishing each of these allegations. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Where the plaintiff claims damages for unlawful cutting of timber, he is claiming permanent damages to the freehold, or damages to the ownership interest, and his right to recover depends upon his establishing his title to the described lands. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

In an action for permanent damages to the freehold, or to the ownership interest, plaintiff must rely upon the strength of his own title. This requirement may be met by various methods: (1) He may offer a connected chain of title or a grant direct from the State to himself. (2) Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for 21 years before the action was brought. (3) He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title to himself and those under whom he claims, for seven years before the action was brought. (4) He may show, as against the State, possession under known and visible boundaries for 30 years, or as against individuals for 20 years before the action was brought. (5) He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. (6) He may connect the defendant with a common source of title and show in himself a better title from that source. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

**The possession of real property is not a sufficient interest upon which to base a recovery** for permanent damages to the freehold — the ownership interest. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

**Applied** in Pine Burr Golf, Inc. v. Poole, 8 N.C. App. 92, 173 S.E.2d 478 (1970); Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971); Tyson v. Winstead, 15 N.C. App. 585, 190 S.E.2d 281 (1972); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977).

**Cited** in Brandenburg Land Co. v. White, 26 N.C. App. 548, 216 S.E.2d 912 (1975).

## ARTICLE 43A.

### *Adjudication of Small Claims in Superior Court.*

**§§ 1-539.3 to 1-539.8:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

## ARTICLE 43B.

### *Defense of Charitable Immunity Abolished.*

**§§ 1-539.10 to 1-539.14:** Reserved for future codification purposes.

## ARTICLE 43C.

### *Actions Pertaining to Cities.*

**§ 1-539.15. Claims against cities arising in contract or tort.** — (a) In order to preserve a claim against a city arising in contract or in tort, notice must be given and the cause of action commenced in accordance with this section. A person with a claim against a city arising in tort or contract must give written notice of the claim to the council or its designee within six months, and commence his action within two years, after the claim is due or the cause of action arises. If the complainant suffers from one of the disabilities specified in G.S. 1-17, he or she may give the notice required by this section within the time specified, after the disability is removed. A city may at any time request the appointment of a guardian ad litem to represent a person having a potential claim against the city and known to be suffering from a disability specified in G.S. 1-17.

No action based on a claim arising in contract or in tort may be commenced except after 30 days following the day on which the notice required by this section is given. Unless notice of the claim is given and the action commenced in accordance with this section, any action based on the claim is barred.

(b) All parts of local acts, including city charters, that require notice to a city or town of any claim against it arising in contract or in tort and that prohibit suit against the city or town if notice is not given or that limit the period during which an action may be brought on such a claim after notice has been given are repealed. (1975, c. 361, ss. 1, 2.)

**Editor's Note.** — Session Laws 1975, c. 361, s. 3, provides: "This act is effective October 1, 1975, but does not apply to claims becoming due or causes of action arising before that date."

**Notice Sufficient.** — Notice of a claim filed with a responsible official of a city, such as the city manager or the city attorney, or other designee of the council, is sufficient. Miller v. City of Charlotte, 288 N.C. 475, 219 S.E.2d 62 (1975).

**§§ 1-539.16 to 1-539.20:** Reserved for future codification purposes.

## ARTICLE 43D.

## *Abolition of Parent-Child Immunity in Motor Vehicle Cases.*

**§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases. —** The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent. (1975, c. 685, s. 1.)

**Editor's Note.** — Session Laws 1975, c. 685, s. 2, provides that the act shall become effective Oct. 1, 1975, and apply to causes of action accruing on and after that date.

**Quoted** in Christenbury v. Hedrick, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

**Cited** in Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

# SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

## ARTICLE 44.

## *Compromise.*

**§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.**

**This section on its face applies only to actions for personal injury.** Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**Actions for wrongful death are not included** in the terms of this section. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**Former Law.** — Prior to October 1, 1961, a release executed in favor of one responsible for the original injury protected a physician or surgeon against a claim based on negligent treatment of the injury. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**§ 1-540.3. Advance payments. —** (a) In any claim, potential civil action or action in which any person claims to have sustained bodily injuries, advance or partial payment or payments to any such person claiming to have sustained bodily injuries or to the personal representative of any person claimed to have sustained fatal injuries may be made to such person or such personal representative by the person or party against whom such claim is made or by the insurance carrier for the person, party, corporation, association or entity which is or may be liable for such injuries or death. Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person, party, corporation, association or entity on whose behalf the payment or payments are made or by the insurance carrier making the payments. It shall be incompetent for any party in a civil action to offer into evidence, through any witness either by oral testimony or paper writing, the fact of the advance or partial payment or payments made by or on behalf of the opposing party. The receipt of the advance or partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims and causes of action for personal injuries or wrongful death, as applicable.

(b) In any civil action for personal injuries or wrongful death the person or party against whom claim is made for such injuries or death and by or on whose behalf advance or partial payment or payments have been made to the party asserting the claim shall file with the Court and serve upon opposing counsel a motion setting out the date and amount of payment or payments and praying that said sums be credited upon any judgment recovered by the opposing party against the party on whose behalf the payment or payments were made. Prior to the entry of judgment, the trial judge shall conduct a hearing and may consider affidavits, oral testimony, depositions, and any other competent evidence, and shall enter his findings of fact and conclusions of law as to whether the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s) to the party asserting the claim for injuries or wrongful death. Upon a finding that the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s), all such payments shall be credited by the trial judge upon any judgment rendered in favor of the person or representative who received the payment or payments. Advance payments made by one joint tort-feasor shall not inure to the benefit or credit of any joint tort-feasor not making such payments.

No claim for reimbursement may be made or allowed by or on behalf of the person or party making such advance payment or payments against the person or party to whom such payment or payments are made except a claim based on fraud.

The making of any advance payment shall not affect in any way whatsoever the running of the statute of limitations. (1971, c. 854.)

## ARTICLE 45.

## *Arbitration and Award.*

**§§ 1-544 to 1-567:** Repealed by Sessions Laws 1973, c. 676, s. 1, effective August 1, 1973.

**Cross Reference.** — For present statute covering the subject matter of the repealed sections, see §§ 1-567.1 through 1-567.20.

## ARTICLE 45A.

## *Arbitration and Award.*

**§ 1-567.1. Short title.** — This Article may be cited as the Uniform Arbitration Act. (1927, c. 94, s. 24; 1973, c. 676, s. 1.)

**Cross Reference.** — As to arbitration of labor disputes, see §§ 95-36.1 to 95-36.9.

**Editor's Note.** — Session Laws 1973, c. 676, s. 3, makes the act effective Aug. 1, 1973.

Session Laws 1973, c. 676, s. 2, contains a severability clause.

**§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.** — (a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

(b) This Article shall not apply to:

(1) Any agreement or provision to arbitrate in which it is stipulated that this Article shall not apply or to any arbitration or award thereunder;

(2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply. (1927, c. 94, s. 1; 1973, c. 676, s. 1; 1975, c. 19, s. 1.)

**Editor's Note.** — The 1975 amendment corrected an error in the 1973 amendatory act by substituting "justiciable" for "justifiable" near the end of the second sentence of subsection (a).

**Cited** in C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships, 375 F. Supp. 446 (M.D.N.C. 1974).

**§ 1-567.3. Proceedings to compel or stay arbitration.** — (a) On application of a party showing an agreement described in G.S. 1-567.2, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein. Otherwise the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused or a stay of arbitration granted on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown. (1973, c. 676, s. 1.)

**§ 1-567.4. Appointment of arbitrators by court.** — If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement. (1927, c. 94, s. 4; 1973, c. 676, s. 1.)

**§ 1-567.5. Majority action by arbitrators.** — The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this Article. (1973, c. 676, s. 1.)

**§ 1-567.6. Hearing.** — Unless otherwise provided by the agreement:

(1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(3) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(4) Upon the request of any party or any arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing. (1927, c. 94, ss. 6, 7; 1973, c. 676, s. 1.)

**Arbitrators May Not Seek Evidence Outside Hearing.** — The arbitrators have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

**And Such Action Violates Arbitration Agreement.** — Actions of the arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties is a violation of this article and hence of the arbitration agreement. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

**§ 1-567.7. Representation by attorney.** — A party has the right to be represented by an attorney at any proceeding or hearing under this Article. A waiver thereof prior to the proceeding or hearing is ineffective. (1927, c. 94, s. 9; 1973, c. 676, s. 1.)

**§ 1-567.8. Witnesses; subpoenas; depositions.** — (a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be as provided in G.S. 7A-314. (1927, c. 94, ss. 10, 11; 1973, c. 676, s. 1.)

**§ 1-567.9. Award.** — (a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him. (1927, c. 94, ss. 8, 14; 1973, c. 676, s. 1.)

**§ 1-567.10. Change of award by arbitrators.** — On application of a party or, if an application to the court is pending under G.S. 1-567.12, 1-567.13 or 1-567.14, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 1-567.14, or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within 10 days from the notice. The award so modified or corrected is subject to the provisions of G.S. 1-567.12, 1-567.13 and 1-567.14. (1973, c. 676, s. 1.)

**§ 1-567.11. Fees and expenses of arbitration.** — Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. (1973, c. 676, s. 1.)

**§ 1-567.12. Confirmation of an award.** — Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 1-567.13 and 1-567.14. (1927, c. 94, s. 15; 1973, c. 676, s. 1.)

**§ 1-567.13. Vacating an award.** — (a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in subdivision (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with G.S. 1-567.4, or, if the award is vacated on grounds set forth in subdivisions

(3) or (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with G.S. 1-567.4. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award. (1927, c. 94, s. 16; 1973, c. 676, s. 1.)

**Parties May Depose Arbitrators.** — Where an objective basis exists for a reasonable belief that misconduct has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

**And such depositions are admissible** in a proceeding under this section to vacate an award. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

**§ 1-567.14. Modification or correction of award.** — (a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award. (1927, c. 94, s. 17; 1973, c. 676, s. 1.)

**§ 1-567.15. Judgment or decree on award.** — Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court. (1927, c. 94, ss. 19, 21; 1973, c. 676, s. 1.)

**§ 1-567.16. Applications to court.** — Except as otherwise provided, an application to the court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action. (1927, c. 94, s. 5; 1973, c. 676, s. 1.)

**§ 1-567.17. Court; jurisdiction.** — The term "court" means any court of competent jurisdiction of this State. The making in this State of an agreement described in G.S. 1-567.12, or any agreement providing for arbitration in this State or under the laws thereof, confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award thereunder. (1927, c. 94, s. 3; 1973, c. 676, s. 1.)

**§ 1-567.18. Appeals.** — (a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under G.S. 1-567.3;

(2) An order granting an application to stay arbitration made under G.S. 1-567.3(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this Article.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (1927, c. 94, s. 22; 1973, c. 676, s. 1.)

**§ 1-567.19. Article not retroactive.** — This Article applies only to agreements made on or after August 1, 1973. (1973, c. 676, s. 1.)

**Applied** in C.P. Robinson Constr. Co. v. National Corp. for Housing Partnerships, 375 F. Supp. 446 (M.D.N.C. 1974).

**§ 1-567.20. Uniformity of interpretation.** — This Article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23; 1973, c. 676, s. 1.)

## ARTICLE 49.

## *Time.*

**§ 1-593. How computed.**

**Cited** in Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970).

## ARTICLE 50.

## *General Provisions as to Legal Advertising.*

**§ 1-598. Sworn statement prima facie evidence of qualification; affidavit of publication.**

**Applied** in Brock v. North Carolina Property Tax Comm'n, 29 N.C. App. 324, 224 S.E.2d 295 (1976).

# Chapter 1A.

## Rules of Civil Procedure.

Sec.
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## § 1A-1. Rules of Civil Procedure.

### ARTICLE 1.

### *Scope of Rules — One Form of Action.*

### Rule 1. Scope of rules.

These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. They shall also govern the procedure in tort actions brought before the Industrial Commission except when a differing procedure is prescribed by statute. (1967, c. 954, s. 1; 1971, c. 818.)

**Editor's Note. —**

The 1971 amendment added the second sentence.

For article on the legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Application of Effective Date.** — The clear intent of the General Assembly in Session Laws 1969, c. 803, was to apply the new rules from the effective date to all civil cases, and not to permit the confusion which would be attendant upon trying to apply different procedures to cases begun before and to cases begun after the effective date. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

**The rules are the same in both district and superior courts** and the inherent powers of these courts are the same as far as procedural matters are concerned. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**The canon of interpretation of the rules is one of liberality,** and the general policy of the rules is to disregard technicalities and form and determine the rights of litigants on the merits. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**The North Carolina Rules of Civil Procedure are modeled after the federal rules.** In most instances they are verbatim copies with the same enumerations. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Consideration of Decisions under Federal Rules and New York Rules.** — Since the federal and presumably, the New York rules are the source of these rules, the Supreme Court will look to the decisions of those jurisdictions for enlightenment and guidance to develop the philosophy of the new rules. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

Although these rules differ somewhat from the federal rules, the federal rules are one of the sources of the North Carolina rules; and decisions under them are pertinent for guidance and enlightenment to develop the philosophy of the new rules. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**Application of Rules.** — The Rules of Civil Procedure do not apply to proceedings before the State Board of Assessment (now Department of Revenue). In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

The foreclosure of the deed of trust under the power of sale contained therein is not an action or proceeding subject to the Rules of Civil Procedure. Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976).

**Inapplicability of Rule 62 to Summary Ejectment.** — See opinion of Attorney General to Mr. Alton J. Knight, Clerk of Superior Court, Durham County, 40 N.C.A.G. 529 (1970).

**Applied** in Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972); In re Will of Mucci, 287 N.C. 26, 213 S.E.2d 207 (1975).

**Cited** in Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

## Rule 2. One form of action.

**Quoted** in Bradley v. Bradley, 12 N.C. App. 8, 182 S.E.2d 201 (1971).

**Cited** in Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

## ARTICLE 2.

### *Commencement of Action; Service of Process, Pleadings, Motions, and Orders.*

## Rule 3. Commencement of action.

**The intent of this rule is to require plaintiff to alert the defendant** by giving preliminary notice of the nature of the claim and the purpose of the suit; the ultimate factual averments will follow in a complaint to be filed later. Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

**This rule appears to incorporate the provisions of former § 1-121.** Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

**This rule and Rule 65(b) must be construed in pari materia;** procedure under Rule 65(b) is permissible only after an action is commenced as provided by this rule. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

**The usual and most frequently employed methods for service of process on a natural person** are personal service and substituted personal service. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Where plaintiff commenced an action by issuance of summons in accordance with former procedure** but had not yet filed a complaint, the subsequent enactment of the Rules of Civil Procedure, under which an action is commenced by filing a complaint, did not require that she recommence her action in accordance with this rule. Williams v. Blount, 14 N.C. App. 139, 187 S.E.2d 464 (1972).

**Complaint or Summons as Condition Precedent to Issuance of Injunction.** — The filing of a complaint, or the issuance of summons pursuant to this rule, is a condition precedent to the issuance of an injunction or restraining order, and when a complaint is not filed or summons is not issued as provided in this rule, an action is not properly instituted and the court does not have jurisdiction. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Where there was no complaint, and where the record failed to disclose that a summons was ever issued, the superior court did not have jurisdiction, and therefore the temporary restraining order was void, and disobedience of it was not punishable. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Under North Carolina statutes and procedure, an injunction is not a cause of action or a lawsuit in and of itself, but is a remedy which is ancillary to a pending suit; therefore, where no complaint or summons has been filed, no action has been instituted and there is no pending action to which the injunction can be ancillary. Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S. Ct. 1576, 39 L. Ed. 2d 880 (1974).

**Validity of Order Extending Time for Filing Complaint.** — An order extending the time within which to file a complaint was not rendered invalid by the facts that the application for the extension did not request permission to file complaint "within 20 days" and that the order did not state the nature and purpose of the action. Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

**Document Held Not to Be Complaint.** — A document denominated an affidavit did not purport to be a complaint and could not be held to be one, because, among other things, (1) it was not properly captioned as required by Rule 10(a), (2) it was not signed by an attorney of record as required by Rule 11(a), and (3) there was no demand for relief made in the document as required by Rule 8(a)(2). Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

**Applied** in Bradley v. Bradley, 12 N.C. App. 8, 182 S.E.2d 201 (1971); Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722 (1972); Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972).

**Cited** in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Cogdill v. Scates, 290 N.C. 31, 224 S.E.2d 604 (1976); McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976); Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 225 S.E.2d 329 (1976).

## Rule 4. Process.

(j) *Process — manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

(1) Natural Person. — Except as provided in subsection (2) below, upon a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee only.

(2) Natural Person under Disability. — Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State. — Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney general.

(4) An Agency of the State.—

a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney general.

d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies.—

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such county.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, or (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii).

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

(6) Domestic or Foreign Corporation. — Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

(7) Partnerships. — Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers. — Upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found within State. — Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by such corporation to be served or to accept service of process, service upon the defendant may be made in the following manner:

a. Personal service outside State. — Personal service may be made on any party outside this State by anyone authorized by section (a) of this rule and in the manner prescribed in this section (j) for service on such party within this State. Before judgment by default may be had on such service, there shall be filed with the court an affidavit of service showing the circumstances warranting the use of personal service outside this State and proof of such service in accordance with the requirements of G.S. 1-75.10(1).

b. Registered or certified mail. — Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered or certified mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him. This affidavit together with the return receipt signed by the person who received the mail raises a rebuttable presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the defendant's dwelling house or usual place of abode.

c. Service by publication. — A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9). Service of process by publication shall consist of publishing a notice of service of process by publication in a newspaper qualified for legal advertising in accordance with G.S. 1-597, 1-598, and published in the county where the action is pending or, if no qualified newspaper is published in such county, then in a qualified newspaper published in an adjoining county, or in a county in the same judicial district, once a week for three successive weeks. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2) and the circumstances warranting the use of service by publication.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action, which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (viii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA

. . . . . . . . . . . . . . . . . COUNTY

In the . . . . . . . . . . . . . . . . Court

[Title of action or special proceeding] To [Person to be served]:

Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than . . . . . . . . . . ., 19 . . . .) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows:

(State nature.)

You are required to make defense to such pleading not later than (. . . . . ., 19 . . . .) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the . . . . . . . . . . . . day of . . . . . . . . . ., 19 . . . . . . . . . . . . . . . . . . . .

. . . . . . . . . . . . . . . . . . (Attorney) (Party)
. . . . . . . . . . . . . . . . . . (Address)

d. Alternative provisions for service in a foreign country. — Where service under this subsection (9) is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (iii) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer or a managing or general agent; or (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (v) as directed by order of the court. Service under (iii) or (v) may be made by any person authorized by section (a) of this rule or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, the order of the court or paragraph b hereof, in which case there shall be included an affidavit or certificate of addressing and mailing by the clerk of the court, or by the law of the foreign country.

e. Attack on judgment by default. — No party served under this subsection (9) may attack any judgment by default entered on such service on the ground that service, as required by this section (j), should or could have been effected, with or without due diligence, under some other subsection of this section (j) or under a different paragraph of this subsection (9).

(j1) *Personal jurisdiction by acceptance of service.* — Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(1971, c. 962; c. 1156, s. 2; 1975, cc. 408, 609; 1977, c. 910, ss. 1-3.)

**Editor's Note.** —

The first 1971 amendment added section (j1).

The second 1971 amendment substituted "such corporation" for "appointment or by law" near the end of the introductory language of subsection (9) of section (j).

The first 1975 amendment, effective July 1, 1975, inserted "or certified" preceding "mail" throughout paragraph b of section (j)(9).

The second 1975 amendment, effective July 1, 1975, added subdivision c to subsections (1), (6) and (8) of section (j) and added provisions as to service by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, in subsection (3), in subdivisions a and c of subsection (4), in subdivisions a, b, c and d of subsection (5), and in subdivision a of subsection (7), of section (j).

The 1977 amendment, in subsection (j)(9), redesignated clauses (vi) and (vii) in the second paragraph of subdivision (9) c of section (j) as clauses (vii) and (viii), added present clause (vi) to that paragraph, and added the fifth sentence to subdivision b.

As the rest of this rule was not changed by the amendments, only sections (j) and (j1) are set out.

For article on the legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970). For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970). For article on modern statutory approaches to service of process outside the state, see 49 N.C.L. Rev. 235 (1971).

**Purpose of Service, etc. —**

In accord with original. See Farr v. City of Rocky Mount, 10 N.C. App. 128, 177 S.E.2d 763 (1970), cert. denied, 277 N.C. 725, 178 S.E.2d 831 (1971).

**Service of process by publication is in derogation of the common law.** Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971); Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Thus, statutes authorizing service of process by publication are strictly construed,** both as grants of authority and in determining whether service has been made in conformity with the statute. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971); Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Service by Registered Mail Complies with Due Process.** — Service by registered mail is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, and therefore, complies with due process requirements. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

**Summons Must Be Directed to Defendants.** — A summons was held patently defective under § 1-105 when it was directed not to the nonresident defendants as required by this rule but instead to the Commissioner of Motor Vehicles, who was summoned and notified to appear and answer the complaint. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

**This rule does not require an order of publication supported by an affidavit.** Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

**But Plaintiff Must File Affidavit Showing Circumstances Warranting Service by Publication.** — This rule does not require an order of publication supported by an affidavit. However, in order to utilize service of process by publication it is necessary that plaintiff file with the court an affidavit showing the circumstances warranting the use of service by publication. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

**Purported service by publication on respondent in a proceeding to terminate parental rights** was invalid where petitioner filed no affidavit showing the publication and mailing in accordance with § 1-75.10(2) and the circumstances warranting the use of service by publication, and the trial court found merely that it appeared to be "impractical" to obtain personal service and that the sheriff was unable to find respondent at his last known address in the county, there being no determination that respondent could not after due diligence be served or that his whereabouts or usual abode and his post office address could not be determined with due diligence. In re Phillips, 18 N.C. App. 65, 196 S.E.2d 59 (1973).

**Rule 41(b) and section (e) of this rule are not in conflict,** and both can be given effect. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

**Authority of Judge under Rule 41(b).** — Rule 41(b) specifically gives to the judge the discretionary and limited authority, not to resurrect an action which was discontinued under section (e) of this rule, but to give the plaintiff a new opportunity to litigate his case on the merits. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

**Suing Out Alias or Pluries, etc. —**

This rule mandates that something be done in the clerk's office to revive a discontinued action — obtain an alias or pluries summons or an endorsement to the original summons. Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 225 S.E.2d 329 (1976).

**When Amendment of Summons Allowed.** — Section (i) empowers the court to allow amendment of the summons at any time in its discretion unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974).

**Limitation on Court's Discretion under Section (i).** — The broad discretionary power given the court by section (i) does not extend so far as to permit the court by amendment of its process to acquire jurisdiction over the person of a defendant where no jurisdiction had yet been acquired. Carl Rose & Sons Ready Mix Concrete v. Thorp Sales Corp., 30 N.C. App. 526, 227 S.E.2d 301 (1976).

**Extent of Amendment Allowed.** — This rule does not provide for any greater liberality of amendment than did former § 1-163. Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974).

**Variance Between Original and Duplicate Copies of Summons Held Fatal.** — Where pursuant to section (i) original and duplicate copies of a summons directs defendant to appear in one county, and the action is actually pending in another county, this constitutes a fatal variance which may not be connected by amendment, and a motion to quash under Rule 12 should be allowed. Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974).

**Section (j) of this rule is tied closely to the new jurisdiction statute,** § 1-75.1 et seq., and the two are complementary to one another. While the jurisdiction statute greatly liberalizes the grounds for jurisdiction, the rules regarding service of process are tightened to insure as much as possible that the defendant receives actual notice of the controversy. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

**Section (j)(1)a must be strictly construed,** and the prescribed procedure must be strictly followed; and, unless the specified requirements are complied with, there is no valid service. Guthrie v. Ray, 31 N.C. App. 142, 228 S.E.2d 471, cert. granted, 291 N.C. 323, 230 S.E.2d 676 (1976).

**Return Showing Legal Service under Section (j)(1)a Creates Rebuttable Presumption.** — When the officer's return on the summons shows legal service under section (j)(1)a, a rebuttable presumption of valid service of process is credited. Guthrie v. Ray, 31 N.C. App. 142, 228 S.E.2d 471, cert. granted, 291 N.C. 323, 230 S.E.2d 676 (1976).

**Fifteen-year-old boy as "person of suitable age and discretion"** within section (j)(1)a of this rule. See Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975).

**Dwelling House or Usual Place of Abode.** — It is unrealistic to interpret section (j)(1)a of this rule so that the person to be served only has one dwelling house or usual place of abode at which process may be left. Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975).

**Subsection (j)(6) requires three jurisdictional facts:** (1) a claim arising out of a bargaining arrangement made with the defendant by or on behalf of the plaintiff; (2) a promise made anywhere which evidences the bargaining arrangement upon which suit is brought; and (3) the subject matter of the arrangement is real property situated in the State. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

**Section (j)(6)a, is like federal Rule 4(d)(3)** in that it provides for service on a foreign corporation by delivery of the summons to a "managing agent." Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

Section (j)(6)a has the same scope as federal Rule 4(d)(3), as it only covers "managing agent," and not any other agent, either expressly or impliedly authorized. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

**Service Contemplated by Section (j).** — Section (j)(6) of this rule contemplates service on agents either expressly or impliedly appointed by the corporation as agents to receive process. Simms v. Mason's Stores, Inc., 18 N.C. App. 188, 196 S.E.2d 545 (1973); rev'd on other grounds, 285 N.C. 145, 203 S.E.2d 769 (1974).

When service of process is made upon a corporation, the summons must be served upon a person who is either an officer, director, or managing agent of the corporation, or one managing his office at the time, an agent expressly or impliedly appointed by the corporation to receive process, an agent specified by statute to receive service, an agent implied in law, or an agent by estoppel. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

Under this rule, service may be had on a corporation by leaving a copy of the summons and complaint in the office of the president of the corporation with the person who is apparently in charge of the office. Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

**Service on Security Officer of Corporation-Owned Store.** — Where deputy sheriff delivered a summons and complaint in an assault action to a security officer who was standing near a cash register in defendant's place of business, whom the deputy had seen as a court witness for defendant, and on whom the deputy had served subpoenas on prior occasions, the attempted service of process upon defendant was void and the trial court did not obtain jurisdiction over the person of the defendant thereby, since the security officer was not an officer, director or managing agent of defendant's store, nor was he a person apparently in charge in the manager's office, an agent authorized to accept service by appointment or an agent authorized to accept service by law under section (j)(6) of this rule. Simms v. Mason's Stores, Inc., 18 N.C. App. 188, 196 S.E.2d 545 (1973), rev'd on other grounds, 285 N.C. 145, 203 S.E.2d 769 (1974).

**The phrase "an agent authorized . . . by law to be served"** includes within its scope State statutes vesting authority in certain persons to receive process, agencies implied in law, and agencies by estoppel. Simms v. Mason's Stores, Inc., 18 N.C. App. 188, 196 S.E.2d 545 (1973), rev'd on other grounds, 285 N.C. 145, 203 S.E.2d 769 (1974).

**A general or managing agent must be invested with powers of discretion** and must exercise judgment in his duties, rather than being under direct superior control as to the extent of his duty and the manner in which he executes it. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

**And Reflect Degree of Continuity.** — It is reasonable to expect that a managing agent will have broad executive responsibilities and that his relationship will reflect a degree of continuity. Authority to act as agent sporadically or in a single transaction ordinarily does not satisfy this provision of the rule. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

**The role played by a local distributor** in assigning territory and assisting the distributors within his overall territory, from whose sales he receives a commission as an independent contractor, does not make him a "managing agent" within the meaning of this rule. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

**One change has been made by this rule in regard to the requirements of a mailing.** Under the prior law the clerk of court, rather than the plaintiff, was the person required to mail a copy of the notice of service of process by publication to the defendant. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**When Mailing Notice of Service May Be Omitted.** — The mailing of the notice of service of process by publication to defendant's address may be omitted only if the post-office address cannot be ascertained in the exercise of reasonable diligence. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Appeal from Court's Determination of Jurisdiction.** — When a defendant challenges the authority of a court on the ground it has not acquired personal jurisdiction, the court's determination of its own jurisdiction may be questioned only by appeal and not collaterally. Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972).

A judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972).

**Service of Process upon Defendant in Divorce Action by Leaving Copies with Defendant's Mother at the Defendant's Address Is Sufficient Service and Is Sufficient for Nonjury Trial.** — See opinion of Attorney General to Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 41 N.C.A.G. 473 (1971).

**Subsection 4(j)(9) was not made ineffective by the reenactment of § 1-105.** House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

**And either the method of service under § 1-105 or that under subsection (j)(9) of this rule is available** to serve a nonresident operator of motor vehicle under appropriate circumstances. House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

**Subsection (j)(9) is not restricted to any one type of civil case,** and is available for accidents involving motor vehicles. House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

**The language of section (j)(9)b is explicit and mandatory.** Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977).

**The long-arm manner of personal service under section (j)(9)b may be made in a court** of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in § 1-75.4. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**Section (j)(9)b does not require personal delivery to the addressee.** Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977).

**Meaning of "Delivered to the Addressee" in Section (j)(9)b.** — The provision in section (j)(9)b, providing that service of process will be complete when copies of the summons and complaint are "delivered to the addressee," comtemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee. Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977).

**Return Receipt of Registered Mail Alone Insufficient to Prove Service of Process under Section (j)(9)b.** — The return receipt of registered mail, without the accompanying affidavit which is required, is insufficient to prove service of process by mail under section (j)(9)b. Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977).

**But Return Receipt Together with Affidavit Raises Rebuttable Presumption of Valid Service.** — The return receipt, together with the affidavit of plaintiff's attorney averring that defendant could not be found within this State and that he sent a copy of the summons and complaint to the defendant by registered mail, return receipt requested, shows sufficient compliance with section (j)(9)b to raise a rebuttable presumption of valid service. Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977).

**Provisions of Rule 4(j)(9)b for Service of Process by Registered Mail Not "Personal Service" for Purposes of Waiving Jury Trial in Divorce Actions.** — See opinion of Attorney General to Honorable Tom H. Matthews, District Court Judge, Seventh Judicial District, 40 N.C.A.G. 385 (1970).

**Production of Actual Registry Return Receipt Not Necessary.** — Subsection (j)(9) clearly implies that one can be held to answer without production of the actual registry return receipt. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

**Showing Required under Section (j)(9)c.** — Section (j)(9)c of this rule does not require a showing both that the whereabouts of the party to be served cannot with due diligence be ascertained and that there has been a diligent but unsuccessful attempt to serve him under one of the preceding subparagraphs of subsection (9) under which a summons would necessarily have been issued. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976).

**Issuance of a summons is not essential to validity of service of process by publication made pursuant to section (j)(9)c upon a party** to a civil action whose address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976).

**Defendant Held Entitled to Notice of Plaintiff's Claim.** — Where the surplus from foreclosure on property owned by plaintiff and defendant by the entireties was within the legal custody of the court and the respective rights of the parties depended in large measure upon whether the fund was to be considered as real property and subject to the law applicable to an estate by the entirety or as personal property, defendant was entitled to specific notice of plaintiff's claim with respect to the fund before determination of that issue. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

The fact that an action for "alimony without divorce" had been instituted did not constitute notice that plaintiff was seeking a determination of the respective rights of plaintiff and defendant in a surplus that might result in the event of a foreclosure of a deed of trust by the trustee. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

**Service of Process Held Invalid.** — Service of process on the male defendant was invalid where summons and complaint were handed to his mother, the feme defendant, with whom he resided in Union County, after she voluntarily accompanied a deputy sheriff from her residence to Mecklenburg County where she was served with process herself. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Where plaintiff could have and therefore should have effected personal service of process by leaving copies of the summons and court order at defendant's residence with a person of suitable age and discretion living there, but chose to institute service of process by publication, defendant was not subject to service of process by publication under subsection (j)(9)c of this rule. Therefore, the attempted service of process by means of publication was void. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Personal Service by Summons Upheld.** — Where a third-party defendant, resident of California, allegedly committed a tort while working in North Carolina, personal service by summons delivered to him by a U.S. marshall in California according to §§ 1-75.3, 1-75.4 and section (j)(1)a and (j)(9)a of this rule satisfied the traditional notions of fair play and substantial justice required by the due process clause of the Fourteenth Amendment. Bowdach v. Frontierland, Inc., 347 F. Supp. 233 (W.D.N.C. 1972).

**Substituted Service of Process Held Proper.** — Where the trial court has jurisdiction over the nonresident defendant by reason of a contract to convey land situated in North Carolina, substituted service of process by registered mail, return receipt requested, was a proper means of acquiring personal jurisdiction over defendant, and the requirements of due process and notice were afforded him. Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974).

**Applied** in Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972); William R. Andrews Assocs. v. Sodibar Systems, 25 N.C. App. 372, 213 S.E.2d 411 (1975); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); William R. Andrews Assoc. v. Sodibar Systems, 28 N.C. App. 663, 222 S.E.2d 922 (1976).

**Quoted** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977).

**Cited** in Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970); Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478 (1973); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

## Rule 5. Service and filing of pleadings and other papers.

(a) *Service — when required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Service — how made.* — A pleading setting forth a counterclaim or crossclaim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1.)

**Comment — 1975 Amendment.** — The amendment adds the words "every paper relating to discovery required to be served upon a party unless the court otherwise orders." It, therefore, makes it clear that all papers relating to discovery required to be served on any party must be served on all parties, unless the court orders otherwise. The language of the former rule expressly included notices and demands, but was not explicit as to answers or responses under Rules 33, 34, and 36. The court is given the power to vary the requirement if in a given case it proves needlessly onerous, such as where the papers are voluminous or where there are numerous parties.

**Editor's Note.** — The first 1971 amendment, effective Jan. 1, 1972, deleted "in the manner provided for service of process in Rule 4" at the end of the first sentence of section (b), deleted the former second sentence of section (b), which read "Written return shall be made by the officer making or attempting to make service thereof, but failure to make return shall not invalidate the service," and deleted "other" preceding "pleadings" near the beginning of the present second sentence of section (b).

The second 1971 amendment substituted "Postal Service" for "Post Office Department" in the fifth sentence of section (b).

The 1975 amendment inserted "every paper relating to discovery required to be served upon a party unless the court otherwise orders" in section (a).

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

As the rest of this rule was not changed by the amendments, only sections (a) and (b) are set out.

**This rule has no applicability to service of case on appeal as required by § 1-282** and the case law of this State. Thurston v. Salisbury Zoning Bd. of Adjustment, 24 N.C. App. 288, 210 S.E.2d 275 (1974).

**Defendant's written motion to set aside a default judgment** is not one which might be heard ex parte. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

**Section (b) applies to the service of notice of appeal from a magistrate to the district court.** Ball Photo Supply Co. v. McClaim, 30 N.C. App. 132, 226 S.E.2d 178 (1976).

**Effect of Failure to Serve Copy of Answer.** — The requirement in section (b) that a counterclaim or cross claim be filed with the court and a copy sent to the opposing party does not make a new or separate litigation out of a counterclaim or cross claim which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Therefore, whatever other consequences may flow from failure to serve a copy of the answer, such failure does not result in causing the statute of limitations to run against the claim until such service is accomplished. In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

**Filing of Answer within 30 Days Not Required under Section (d).** — While rule 12(a)(1) requires that the defendant serve his answer within 30 days, there is nothing in section (d) of this rule that requires the defendant to file his answer with the court within 30 days as well. Section (d) does not provide any period in which the filing must take place. Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976).

**Where motion for alimony did not specify a date for a hearing,** but was served, by depositing it in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Quoted** in Towne v. Cope, 32 N.C. App. 660, 233 S.E.2d 624 (1977).

## Rule 6. Time.

**Editor's Note. —**

For article on modern statutory approaches to service of process outside the state, see 49 N.C.L. Rev. 235 (1971).

**This rule gives the court discretionary authority to enlarge the time** required for something to be done by the rules or a notice given under the rules or order of court. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

A motion pursuant to section (b) to enlarge the time for filing a pleading is addressed to the discretion of the trial court. Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976).

**But Discretion Is Not Unrestrained. —** Section (b) gives the trial court wide discretionary authority to enlarge the time within which an act may be done; however, the discretion to be exercised is a judicial discretion, not an unrestrained one. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**When Discretion Can Be Exercised. —** The discretion given the court to enlarge time can be exercised upon request prior to expiration of the time or upon motion after expiration of the time where the failure to act within the time prescribed was the result of excusable neglect. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Johnson v. Hooks, 21 N.C. App. 585, 205 S.E.2d 796, cert. denied, 285 N.C. 660, 207 S.E.2d 754 (1974).

**Section (b) Not Intended to Be Applied to Amend Judgment Entered. —** All of the rules cited in section (b) have to do with the time within which a motion can be made for action which would affect a judgment entered or findings of fact in a judgment entered. It was not intended to be applied for the purpose of amending a judgment entered. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

Section (b) was not intended to have the effect of giving the court the discretion to amend a final order entered under the mandatory directive of a statute. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

**Enlarging Time for Filing Answer. —**

Where the trial judge concluded that defendant's failure to answer was a result of "excusable neglect," set aside entry of default and ordered that defendant's answer be filed and remain of record, it was not necessary that defendant file a section (b) motion for enlargement of time to file answer, though that would have been the better practice. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

**Showing of Excusable Neglect Necessary Where Request Untimely. —** If the request under this rule for enlargement of time in which to do an act is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**General Appearance Made by Securing Extension of Time. —** By securing an extension of time in which to answer or otherwise plead, defendant made a general appearance which rendered service of summons upon it unnecessary. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

**Motion Did Not Waive Right to Make Rule 12(b) Defenses. —** Defendant's motion for an extension of time in no way waived his right to make any of the Rule 12(b) defenses allowed by motion. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**Waiver Under Rule 12(h) Not Applicable to Motion for Enlargement of Time. —** While Rule 12(h) does provide for waiver of the defense of improper venue when not joined in a motion made under that rule, this waiver is not applicable to a motion for enlargement of time made under this rule. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**Section (d) Applies to Affidavits Supporting Summary Judgment. —** The provision of section (d) which requires that supporting affidavits be served with a motion applies to affidavits in support of a Rule 56 motion for summary judgment. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**Section (d) Does Not Apply to Affidavits Supporting Summary Judgment. —** Section (d) of this rule provides that when a motion is supported by affidavit, the affidavit shall be served with the motion. However, in view of the express provisions of Rule 56, section (d) of this rule does not apply to affidavits presented in support of summary judgment. Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

**Millsaps v. Wilkes Contracting Co. Distinguished. —** See Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**Effect of Section (e). —** Section (e), in effect, extends the minimum 10 day notice period to 13 days when the notice is by mail. This rule serves to alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right. Planters Nat'l Bank & Trust Co. v. Rush, 17 N.C. App. 564, 195 S.E.2d 96 (1973).

**Defendant does not have an absolute right to the notice requirement** of this rule. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

**A party entitled to notice of a motion may waive such notice.** Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975); Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

**And ordinarily does this by attending the hearing** of the motion and participating in it. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

**Parent Ordinarily Entitled to Five Days' Notice of Custody Hearing.** — Ordinarily a parent is entitled to at least five days' notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

**But this is not an absolute right**, and is subject to the rule relating to waiver of notice and to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial, amounting to the denial of a substantial right. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

**Notice for Hearing on Issue of Incompetency.** — Five days' notice would be appropriate for hearing on the issue of incompetency when appointment of a guardian ad litem is proposed, unless the court, for good cause, should prescribe a shorter period. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Where motion for alimony did not specify a date for a hearing,** but was served, by depositing it in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Applied** in Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1972); Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73 (1973); Howell v. Howell, 22 N.C. App. 634, 207 S.E.2d 312 (1974); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976).

**Cited** in Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693 (1972); Barnes v. Barnes, 30 N.C. App. 196, 226 S.E.2d 549, cert. denied, 290 N.C. 775, 229 S.E.2d 31 (1976).

## ARTICLE 3.

## *Pleadings and Motions.*

### Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.* — There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(1971, c. 1156, s. 1.)

**Editor's Note.** —

The 1971 amendment added the second sentence in section (a).

As the rest of this rule was not changed by the amendment, only section (a) is set out.

**"Counterclaim Denominated as Such".** — This rule, in providing that a reply must be filed "to a counterclaim denominated as such," implies there will be counterclaims not so denominated. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Reply Alleging Last Clear Chance Not Exclusive Pleading Alternative.** — While the recommended pleading practice is for the plaintiff to file a reply alleging last clear chance, it is not the exclusive pleading alternative. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

**And Plaintiff Need Not Plead The Doctrine by Generally Accepted Name.** — While the plaintiff must plead the facts making the doctrine of last clear chance applicable in order to rely upon it, it is not required that he plead the doctrine by its generally accepted name. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

**But Some Pleading Alleging Last Clear Chance Is Necessary.** — The words "may serve a reply" in section (a) could be misleading if a plaintiff construed the "may" as permissive and the failure to file a reply as not foreclosing any rights. When section (a) as amended is read in conjunction with rule 8 (d), it is evident that some pleading alleging last clear chance is necessary if a plaintiff seeks to prove the avoidance at trial because Rule 8(d) only deems affirmative defenses appearing in the answer as denied or avoided if a responsive pleading is neither required nor permitted. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

**The word "application" as used in section (b)(1)** of this rule and in subsections (b) and (d) of § 50-16.8 has reference to the same kind of procedure. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Procedure at Trial Where Party Not Permitted to File Responsive Pleading.** — A party who is not permitted to file a responsive pleading may meet the allegations at trial in any manner that would have been proper had a reply been allowed. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

**The right to amend the pleadings of a cause and allow answers or other pleadings** to be filed at any time is an inherent power of the district and superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**"Pleas" Abolished.** — Under section (c) of this rule, "pleas" are specifically abolished. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

**Concept of "Defective Statement of a Good Cause of Action" Abolished.** — When section (c) of this rule abolished demurrers and decreed that pleas "for insufficiency shall not be used," it also abolished the concept of "a defective statement of a good cause of action." Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Section (c) of this rule abolished demurrers, and with them the concept of a defective statement of a good cause of action. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**Thus, Motion to Dismiss May Be Interposed to Defective Claim.** — Generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

**But Not to Defective Statement of Good Claim.** — The motion to dismiss under Rule 12(b)(6) may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action." For such complaint, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

**Sufficiency of Complaint to Withstand Motion to Dismiss.** — A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint, and where allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**A motion for involuntary dismissal may not be properly made pursuant to this rule** because this rule merely defines the form of motions made to the court. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

**When Motion Need Not Be Made in Writing.** — A motion does not have to be made in writing if made during the session at which the cause is calendared for trial. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Oral announcement and presentation of the motion during the session at which the cause was calendared for trial was sufficient properly to bring the matter before the court. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

**Court May Consider Affidavits in Hearing for Injunction.** — Both before and after the adoption of the new rules, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and § 1-485(1) does not prohibit this. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under § 1-485(1) for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

**Under this rule, an application for default judgment is considered a motion in a civil action.** Miller v. Belk, 18 N.C. App. 70, 196

S.E.2d 44, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (1973).

**Applied** in Mangum v. Surles, 12 N.C. App. 547, 183 S.E.2d 839 (1971); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Barnes v. Barnes, 30 N.C. App. 196, 226 S.E.2d 549, cert. denied, 290 N.C. 775, 229 S.E.2d 31 (1976); State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977); In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

**Quoted** in Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971); Student Bar Ass'n Bd. of Governors v. Byrd, 32 N.C. App. 530, 232 S.E.2d 855 (1977).

**Stated** in Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56 (1972).

**Cited** in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Bill v. Hughes, 21 N.C. App. 152, 203 S.E.2d 395 (1974); Thacker v. Harris, 22 N.C. App. 103, 205 S.E.2d 744 (1974).

## Rule 8. General rules of pleadings.

(a) *Claims for relief.* — A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Provided, however, in all professional malpractice actions, including actions against health care providers, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000): Provided that at any time after service of claim for relief, any party may make request of claimant for written statement of the amount of monetary relief sought, and claimant shall, within 10 days after service of such request, serve said statement upon the requesting party, provided that said statement shall not be filed with the court until the action has been called for trial or until entry of default is requested. Provided, any statement of "the amount of monetary relief sought" which is served on an opposing party may be amended in the manner and at the time provided by G.S. 1A-1, Rule 15.

(1975, 2nd Sess., c. 977, s. 5.)

**Editor's Note.** —

For note on specificity in pleading under North Carolina Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970).

The 1975, 2nd Sess., amendment, effective July 1, 1976, added the three provisos to subsection (2) of section (a).

Session Laws 1975, 2nd Sess., c. 977, s. 7, contains a severability clause. Session Laws 1977, 2nd Sess., c. 977, s. 8, provides that the act shall not apply to pending litigation.

As the rest of the rule was not changed by the amendment, only section (a) is set out.

**This rule replaces former § 1-122,** which provided that the complaint must contain a plain and concise statement of the facts constituting a cause of action. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Concept of "Notice Pleading" Adopted.** — By repealing § 1-122, which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give notice of the events intended to be proved showing that the pleader is entitled to relief, the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

By repealing the section which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give notice of the events intended to be proved showing that the pleader is entitled to relief, the legislature obviously intended to change prior law. Its choice of "new semantics" was neither accidental or casual. Considering the inspiration, origin, and legislative history of the Rules of Civil Procedure, and the absence of the word "facts" and the phrase "facts constituting a cause of action," the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

By repealing § 1-122 and enacting section (a)(1) of this rule the General Assembly intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." Madigan v. Jenkins, 31 N.C. App. 391, 229 S.E.2d 213 (1976).

**Detailed Fact Pleading No Longer Required.** — Under the "notice theory" of pleading contemplated by section (a)(1), detailed fact pleading is no longer required. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Madigan v. Jenkins, 31 N.C. App. 391, 229 S.E.2d 213 (1976).

**Simplified "notice pleading" is made possible by the liberal opportunity for discovery** and the other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

**Sufficiency of Pleading under Notice Theory.** — A pleading complies with this rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pre-trial discovery — to get any additional information he may need to prepare for trial. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Lewis v. Gastonia Air Serv., Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972); Patterson v. Weatherspoon, 17 N.C. App. 236, 193 S.E.2d 585 (1972); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973).

Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted, to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); Lewis v. Gastonia Air Serv., Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972); Patterson v. Weatherspoon, 17 N.C. App. 236, 193 S.E.2d 585 (1972); Randolph v. Schuyler, 18 N.C. App. 393, 197 S.E.2d 3 (1973), rev'd on other grounds, 284 N.C. 496, 201 S.E.2d 833 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

The allegations of the verified complaint were sufficiently particular as required by this rule to give the defendant notice of the transactions and occurrences intended to be proved and the type of relief demanded. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

All this rule requires is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

The true test for this rule is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

**Claim for relief and basis for defense must still satisfy requirements of substantive law** which give rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

While this rule does not require detailed fact pleading, nevertheless, it does require a certain degree of specificity. It is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant and the court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

**Mere vagueness or lack of detail is not ground for a motion to dismiss.** Such a deficiency should be attacked by a motion for a more definite statement. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**But vague and conclusory pleading is not encouraged or commended.** Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Notice Theory Does Not Necessarily Require Full-Blown Trial.** — The notice theory of pleading does not necessarily mean that there must be a full-blown trial. Utilizing the facility of pre-trial discovery, the real facts can be ascertained and by motion for summary judgment (or other suitable device) the trial court can determine whether as a matter of law there is any right of recovery on those facts. Sutton v. Duke, 277 N.C. App. 94, 176 S.E.2d 161 (1970).

**Methods for Obtaining Facts More Specifically.** — If for purposes of preparing a defense a defendant wishes to know more specifically than the complaint alleges exactly what facts plaintiffs intended to rely upon, tools, such as discovery proceedings under Rule 26 or perhaps a motion for more definite statement under Rule 12(e), are at her disposal. Nolan v. Boulware, 21 N.C. App. 347, 204 S.E.2d 701, cert. denied, 285 N.C. 590, 206 S.E.2d 863 (1974).

**Specificity Requirements of Section (a)(1) and Corresponding Federal and New York Rules Compared.** — The difference in the degree of specificity required by this rule, the New York Civil Practice Law and Rules, and the federal rules cannot be formularized. It is best realized by a comparison of the various forms of complaint illustrating the respective rules. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

The portion of section (a)(1) not included in federal Rule 8(a)(2) was probably taken from New York Civil Practice Law and Rules § 3013. Section 3013 says: Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and "the material elements of each cause of action or defense." The preceding words in quotes were omitted from section (a)(1) of this rule and constitute the difference between it and the New York section. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

The only appreciable difference between this rule and New York Civil Practice Law and Rules § 3013 is the latter's additional requirement that the statement of claim shall also give notice of "the material elements of each cause of action or defense." No doubt the draftsmen omitted the "material elements" requirement from this rule in an effort to discourage a judicial construction which would retain the former rule that the cause of action consists of facts alleged. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Section (a)(1) Requires More Specificity than Corresponding Federal Rule.** — Under the directive of section (a)(1) a complaint need not be as specific as under former practice, but it must be to some degree more specific than the federal complaint. The added degree of specificity is not readily determinable from the language of the rule itself. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Section (a)(1) differs from corresponding federal Rule 8(a)(2) in that the latter requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

The additional requirements in section (a)(1) manifest the legislative intent to require a more specific statement, or notice in more detail, than federal Rule 8(a)(2) requires. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Value of Precedent under New York and Federal Rules.** — The variant language in the North Carolina, New York, and federal rules prevents the assumption that the legislature adopted section (a)(1) with the judicial construction which had been placed upon either the New York or the federal counterpart. All changes in words and phrasing in a statute adopted from another state or country will be presumed deliberately made with the purpose to limit, qualify, or enlarge the adopted rule. This is not to say, however, that the "sizable body of case law" which the federal rules and the New York rules have produced should be ignored. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

While the Rules of Civil Procedure were primarily patterned after the federal rules, nevertheless, section (a) was also based in part on § 3013 of the New York Civil Practice Law and Rules, and New York case law is relevant in interpreting this rule. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

**Rules Do Not Prevent Detailed Pleading.** — There is nothing in the rules to prevent detailed pleading if the pleader deems it desirable. He may plead enough facts to prevent the invocation of discovery devices or the use of motions for more definite statement. Such a complaint could clearly identify the issues since Rule 10(b) requires the claim or claims to be averred in numbered paragraphs. In other words, there is nothing to prevent skillful and candid pleaders from meeting head-on in the pleadings. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Phrases "Cause of Action" and "Claim for Relief" Not Substantially Different.** — Neither the North Carolina nor the federal rules incorporate the phrase "cause of action." However, in the manner of their use, there is no substantial difference in the meaning of "cause of action" and "claim for relief." Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Pleading Technicalities Identified with "Cause of Action" Rejected.** — The use of the "claim for relief" phrase in the federal rules was not a rejection of "cause of action" as such, but rather a rejection of pleading technicalities identified with "cause of action" (technicalities such as "evidence" or "ultimate facts," "conclusions" or "facts sufficient to constitute a cause of action"). Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**One of the objectives sought to be attained by enactment of section (a)(1)** of this rule was to eliminate the sometimes troublesome and often sterile discussion as to whether a particular allegation states an "ultimate" fact or an "evidentiary" fact or conclusion of law.

Hoover v. Hoover, 9 N.C. App. 310, 176 S.E.2d 10 (1970).

**A petition to condemn land for urban renewal** is sufficient under the Rules of Civil Procedure to state a claim for relief, where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Chapter 160, Article 37 (now Chapter 160A, Article 22) and Chapter 40, Article 2. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**An allegation must be liberally construed.** Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

**Extent of Liberal Construction Rule.** — In giving a liberal construction the courts should not engage in judicial amending or rewriting of pleadings. FCX, Inc. v. Bailey, 14 N.C. App. 149, 187 S.E.2d 381 (1972).

**Language in Section (a) and That in Section (c) Are Largely Identical.** — The language in section (a), dealing with general pleading, and that in section (c), dealing with pleading affirmative defenses, are largely identical. The requirements for pleading an affirmative defense are no more stringent than those for pleading a cause of action. Bell v. Traders & Mechanics Ins. Co., 16 N.C. App. 591, 192 S.E.2d 711 (1972).

**Illustrative Forms 3 and 4, Rule 84, illustrate the sufficient form of a complaint for negligence;** they contain much more than the corresponding federal forms, by requiring the pleader to allege the specific acts which constitute the defendant's negligence. Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 405, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

**Averments in pleadings are admitted when not denied in a responsive pleading,** if a responsive pleading is required. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

The defendant, by failing to answer, admitted that plaintiff was entitled to the possession of the real property. The default was thus established. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

There was no error in an instruction to the jury that the defendant admitted a contract where a paragraph of the complaint alleged the making of the contract and the terms thereof as contended by the plaintiff and the answer stated that the paragraph was not denied and did not allege a different contract. Johnson v. Massengill, 280 N.C. 376, 186 S.E.2d 168 (1972).

**Answer Treated as Counterclaim.** — In a suit for absolute divorce where defendant admits the allegations of the complaint and prays for an absolute divorce on the same grounds, the fact that defendant's pleading is labelled an "answer" does not preclude its being treated also as a counterclaim. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Where a petition requested relief not authorized by statute, the petition stated a defective claim** in that it requested relief the court was powerless to grant regardless of what facts could be proved; and thus a motion to dismiss was properly granted. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

**The right to amend the pleadings of a cause and allow answers or other pleadings** to be filed at any time is an inherent power of the district and superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**Admissions in the pleadings and stipulations by the parties** have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge. Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury. Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

**Defendant can plead alternative, inconsistent defenses** and need not make an election between the two defenses prior to trial. Alpar v. Weyerhaeuser Co., 20 N.C. App. 340, 201 S.E.2d 503, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

**Illegality is an affirmative defense,** under section (c) of this rule, and the burden of proving illegality is on the party who pleads it. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

**Contributory negligence is an affirmative defense,** and the burden of proof on a contributory negligence issue rests on defendant. Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975).

**As Is Misconduct in Divorce Action.** — The burden of pleading, as well as establishing, the affirmative defense of misconduct in a divorce action, is on the defendant. Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972).

**And Waiver.** — Waiver is an affirmative defense which a defendant must plead and which he has the burden of proving. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Ordinarily waiver and estoppel must be pleaded as affirmative defenses. Stuart v. United States Fire Ins. Co., 18 N.C. App. 518, 197 S.E.2d 250 (1973).

**The word "waiver"** means the voluntary relinquishment of a known right. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

**When not raised by the pleading the issue of usury may still be tried** if raised by the express or implied consent of the parties at trial. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 703 (1976).

**Failure to Plead Defense Which Must Be Pleaded.** — Where the defendant does not raise the defense of the statute of frauds, one of the affirmative defenses which must be pleaded, in his pleadings or in the trial, he cannot present it on appeal. Grissett v. Ward, 10 N.C. App. 685, 179 S.E.2d 867 (1971).

**On an affirmative defense, the burden of proof lies with the defendant.** Price v. Conley, 21 N.C. App. 326, 204 S.E.2d 178 (1974).

**A pleading cannot give notice of occurrences that take place a year after** the pleading is filed. Gordon v. Gordon, 7 N.C. App. 206, 171 S.E.2d 805 (1970).

**Sufficiency of Amendment Where Demurrer to Original Complaint Sustained under Prior Practice.** — Where a demurrer to the original complaint was sustained under former § 1-122(2), and motion to dismiss the amended complaint for failure to state a claim for relief was filed after the effective date of the new Rules of Civil Procedure, the sufficiency of the amended complaint was tested against the standard provided in section (a)(1) of this rule, and the order sustaining the demurrer to the original complaint could not be res judicata when considering the question of the sufficiency of the amended complaint under the new rule. Hoover v. Hoover, 9 N.C. App. 310, 176 S.E.2d 10 (1970).

**Procedure at Trial Where Party Not Permitted to File Responsive Pleading.** — A party who is not permitted to file a responsive pleading may meet the allegations at trial in any manner that would have been proper had a reply been allowed. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

**Complaints held sufficient to give defendant fair notice.** Nolan v. Boulware, 21 N.C. App. 347, 204 S.E.2d 701, cert. denied, 285 N.C. 590, 206 S.E.2d 863 (1974).

Where the complaint merely alleges that the defendant treated the plaintiff cruelly and offered indignities to her person, using the exact language of the alimony statute, but it does not refer to any transactions, occurrences or series of transactions or occurrences intended to be proved, nor does it mention any specific act of cruelty or indignity committed by the defendant, the alleged cruelty and alleged indignities may consist of nothing more than occasional nagging of the plaintiff or pounding on a table. Such a complaint does not give defendant fair notice of plaintiff's claim. It is merely an "assertion of a grievance," and it does not comply with section (a) of this rule. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

The complaint gave sufficient notice of the transactions to enable the defendant to understand the nature of it and the basis of it where it appeared to give notice of the nature and basis of plaintiff's claim, the type of case brought and generally to allege that a lease agreement was entered into by the parties and subsequently breached by nonpayment of rent. Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

**Applied** in Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972); Fruit & Produce Packaging Co., Div. of Inland Container Corp. v. Stepp, 15 N.C. App. 64, 189 S.E.2d 536 (1972); Thompson v. Watkins, 15 N.C. App. 208, 189 S.E.2d 615 (1972); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Beachboard v. Southern Ry., 16 N.C. App. 671, 193 S.E.2d 577 (1972); Brantley v. Dunstan, 17 N.C. App. 19, 193 S.E.2d 423 (1972); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); Chance v. Jackson, 17 N.C. App. 638, 195 S.E.2d 321 (1973); Thacker v. Harris, 22 N.C. App. 103, 205 S.E.2d 744 (1974); Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Jones v. Pettiford, 24 N.C. App. 546, 211 S.E.2d 455 (1975); First-Citizens Bank & Trust Co. v. Akelaitis, 25 N.C. App. 522, 214 S.E.2d 281 (1975); Andrews v. North Carolina Farm Bureau Mut. Ins. Co., 26 N.C. App. 163, 215 S.E.2d 373 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976); N.C. Monroe Constr. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497, cert. denied, 291 N.C. 323, 230 S.E.2d 676 (1976); Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977); Raccoon Valley Inv. Co. v. Toler, 32 N.C. App. 461, 232 S.E.2d 717 (1977); Student Bar Ass'n Bd. of Governors v. Byrd, 32 N.C. App. 530, 232 S.E.2d 855 (1977); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977).

**Quoted** in Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971); Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972); Cogdill v. Scates, 290 N.C. 31, 224 S.E.2d 604 (1976).

**Stated** in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971); Bercegeay v. Surfside Realty Co., 16 N.C. App. 718, 193 S.E.2d 356 (1972); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977).

**Cited** in Brewer v. Harris, 10 N.C. App. 515, 179 S.E.2d 160 (1971); Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972); In re Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972); Hamrick v.

Beam, 19 N.C. App. 729, 200 S.E.2d 337 (1973); Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 703 (1976); Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976); Critcher v. Ogburn, 30 N.C. App. 182, 226 S.E.2d 414 (1976); Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

## Rule 9. Pleading special matters.

**This rule codifies established North Carolina law.** Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

**Fraud, Duress or Mistake Must Be Alleged.** — Section (b) of this rule codifies the requirement previously existing that the facts relied upon to establish fraud, duress or mistake must be alleged. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972); In re Estate of Loftin, 21 N.C. App. 627, 205 S.E.2d 574, aff'd, 285 N.C. 717, 208 S.E.2d 670 (1974).

Prior to the effective date of the Rules of Civil Procedure, absent allegations of fact which would constitute fraud if true, evidence of fraud — no matter how complete and convincing — could not be submitted to the jury. Proof without allegation was as ineffective as allegation without proof. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972); In re Estate of Loftin, 21 N.C. App. 627, 205 S.E.2d 574, aff'd, 285 N.C. 717, 208 S.E.2d 670 (1974).

A pleading setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive plaintiff, or must allege facts from which such intent can be legitimately inferred. Moore v. Wachovia Bank & Trust Co., 30 N.C. App. 390, 226 S.E.2d 833 (1976).

**And mere generalities and conclusory allegations of fraud will not suffice** under section (b). Moore v. Wachovia Bank & Trust Co., 30 N.C. App. 390, 226 S.E.2d 833 (1976).

**Allegations Insufficient Under Section (b).** — Where petitioner's allegations amount to a mere conclusion that an antenuptial contract was fraudulently procured, such allegations are not sufficient under section (b). In re Estate of Loftin, 21 N.C. App. 627, 205 S.E.2d 574, aff'd, 285 N.C. 717, 208 S.E.2d 670 (1974).

**Section (c) contains the same provisions as Rule 9(c) of the federal Rules of Procedure.** Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975).

**Failure of Occurrence of Necessary Condition.** — Where a party intends to rely upon the failure of the occurrence of a necessary condition, it should be specially pleaded in the answer. Spencer Oil Co. v. Welborn, 20 N.C. App. 681, 202 S.E.2d 618, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974).

**Conditions Precedent in Action to Condemn Land for Urban Renewal.** — A petition to condemn land for urban renewal is sufficient under the Rules of Civil Procedure to state a claim for relief, where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Chapter 160, Article 37 (now Chapter 160A, Article 22) and Chapter 40, Article 2. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Special damage, as that term is used in the law of defamation,** means pecuniary loss, as distinguished from humiliation. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Operating losses are special damages which must be alleged** under section (g) and are consequential damages which are recoverable under § 25-2-715(2) if defendant knew or reasonably could have foreseen that the probable result of a malfunctioning product would be such operating losses. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

**When Loss of Profits Recoverable as Special Damages in Personal Injury Suits.** — In personal injury suits loss of profits are recoverable as special damages if properly pleaded as such under section (g), if they arise naturally and proximately from the injury, and if they are reasonably definite and certain. Ponder v. Budweiser of Asheville, Inc., 30 N.C. App. 200, 226 S.E.2d 539, cert. denied, 291 N.C. 176, 229 S.E.2d 690 (1976).

**Sum Allegedly Spent to Repair Water System Held Special Damages.** — A sum which plaintiff allegedly spent in its efforts to repair a water system installed by defendant was an item of special damages which should have been specifically pleaded; failure of plaintiff to so plead requires that the portion of the judgment awarding the special damages be vacated. Windfield Corp. v. McCallum Inspection Co., 18 N.C. App. 168, 196 S.E.2d 607 (1973).

**Generally, Private or Local Act Must Be Pled by Title or Day of Ratification.** — As a general rule, a court will not take judicial notice of a private or local act unless it is pled by reference to its title or the day of its ratification; and this is true even though the act is published among the public laws. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**But this rule is one of pleading.** Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**It Is Designed to Prevent Surprise.** — This rule is designed and intended primarily to prevent a litigant from being taken by surprise. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**And Should Not Prevail when Act Formally Brought to Attention of Court and All Parties.** — This rule should never be allowed to prevail when a statute which effectually settles the controversy has been formally brought to the attention of the court and all parties. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Libel and Slander — Defendant May Plead and Prove Truth.** — This rule does not require the defendant in a libel and slander action to reveal whether he intends to prove the defense of truth, and in fact, the latter portion of this rule allows the defendant to plead and prove truth and/or other mitigating circumstances. Alpar v. Weyerhaeuser Co., 20 N.C. App. 340, 201 S.E.2d 503, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

**Applied** in Beachboard v. Southern Ry., 16 N.C. App. 671, 193 S.E.2d 577 (1972); Brantley v. Dunstan, 17 N.C. App. 19, 193 S.E.2d 423 (1972); Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975); N.C. Monroe Constr. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497, cert. denied, 291 N.C. 323, 230 S.E.2d 676 (1976).

**Cited** in Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); Estate of Loftin v. Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974); Smith v. State. 289 N.C. 303, 222 S.E.2d 412 (1976).

## Rule 10. Form of pleadings.

**Pleading Treated as Counterclaim.** — Defendant's failure to allege affirmatively facts within his pleading does not preclude the pleading from being treated as a counterclaim where the answer begins, "the defendant ... alleges and says:" and then admits the allegations of the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

To require defendant who solemnly admits the truth of the allegations of the complaint upon which he then bases his prayer for relief to repeat them in his own pleading as a prerequisite to treating his pleading as a counterclaim seeking affirmative relief would be a triumph of form over substance. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Section (c) permits an incorporation by reference of statements made in other parts of a pleading.** FCX, Inc. v. Bailey, 14 N.C. App. 149, 187 S.E.2d 381 (1972).

**Applied** in Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971); Koehring Co. v. Seacrest Marine Corp., 29 N.C. App. 498, 224 S.E.2d 654 (1976).

**Stated** in Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

## Rule 11. Signing and verification of pleadings.

**Cross References.** —

For requirement that complaint in secondary action by shareholders shall be verified by oath, see Rule 23. For provision requiring affidavit or verified complaint for temporary restraining order, see Rule 65. As to affidavit for arrest in civil action, see § 1-411. As to affidavit or verified complaint for attachment, see § 1-440.11. As to affidavit for claim and delivery, see § 1-473.

**Verified Pleading May Be Considered as Affidavit in Cause.** — There is nothing in the rules which precludes the judge from considering a verified answer as an affidavit in the cause. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

To the extent that a verified pleading meets the requirements of Rule 56(e), then it may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

**Verification by Agent or Attorney Not Specifically Required.** — Section (c) sets forth the circumstances and the manner in which pleadings may be verified by an agent or attorney of a party when the action or defense is founded upon a written instrument for the payment of money only, but it does not specifically require verification. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Insufficient Basis to Impeach Verification.** — See Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

**Applied** in Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

**Cited** in Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

### Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleading.

(a) (1) When Presented. — A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. A party served with a pleading stating a crossclaim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits;

b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

(2) Cases Removed to United States District Court. — Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded. If it shall be finally determined in the United States courts that the action or proceeding was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the action or proceeding to the State court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the proceedings to remove not been instituted, shall have 30 days after the filing in such State court of a certified copy of the order of remand to file motions and to answer or otherwise plead.

(b) *How Presented.* — Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue or division,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. Obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(1971, c. 1236; 1975, c. 76, s. 2.)

**Editor's Note.** — The 1971 amendment, in subsection (a)(1)a, deleted "If the court denies the motion or postpones its disposition until the trial on the merits" preceding "The responsive pleading" and added "in ruling on the motion or postponing its disposition until the trial on the merits."

The 1975 amendment substituted "defenses" for "defense" in the introductory language of section (b) and added the fifth sentence.

Session Laws 1975, c. 76, s. 3, provides: "This act shall become effective October 1, 1975, and shall not affect any pending litigation."

As the rest of the rule was not changed by the amendments, only sections (a) and (b) are set out.

For note on specificity in pleading under North Carolina Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970).

**The Rules of Civil Procedure in the federal courts are substantially identical,** and the application thereof over the years by the federal courts may often serve as a guide in interpretations of these rules. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417 (1971).

**Rule 12 of the federal Rules of Civil Procedure is essentially the same as this rule.** Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

**Section (b) of this rule is essentially a verbatim copy of federal Rule 12(b).** Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Section (h)(3) of this rule is virtually identical to federal Rule 12(h)(3).** Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**Pleadings are to be liberally construed.** Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975).

**Service of Motion Alters Time Period for Answering.** — Although the motions provided for by section (b) are not pleadings under Rule 7(a), section (a) provides that the service of such a motion results in a postponement of the time for serving an answer, and, consequently, no default results pending disposition of these motions. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**District Court Judge May Consider Merits of Divorce Action Immediately after Filing of Defendant's Answer.** — See opinion of Attorney General to Honorable Charles B. Deane, Jr., Senator, Seventeenth District, 43 N.C.A.G. 344 (1974).

**A defect in jurisdiction, etc. —**

Lack of jurisdiction can never be waived by the parties or such jurisdiction conferred on a court by consent of the parties, except where a valid statute may allow jurisdiction to be so conferred. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**Lack of jurisdiction of the subject matter may always be raised** by a party, or the court may raise such defect on its own initiative. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**Failure to State Claim Does Not Constitute Lack of Subject Matter Jurisdiction.** — The failure of the complaint to state a claim upon which relief can be granted does not constitute a lack of jurisdiction of the subject matter. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Jurisdiction of the court over the subject matter is not defeated by the possibility that the allegations of the complaint may fail to state a cause of action upon which plaintiff can recover. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**The manner of presenting the defense of lack of jurisdiction over the person is governed by this rule.** Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

**Former Procedure as to Objection to Jurisdiction over Person.** — Before the adoption of these rules, objection to jurisdiction over the person could be presented by motion or answer, and the making of other motions or the pleading of other defenses simultaneously did not waive the objection. However, the objection was waived if any motion was made or answer filed before the objection to personal jurisdiction was presented. Consequently, an application for an extension of time for responsive pleading, filed before an objection to personal jurisdiction was made, constituted a waiver of any jurisdictional defect due to irregularity in or lack of service of process. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

**Waiver of Defense of Lack of Jurisdiction over Person.** — The right to assert the defense of lack of jurisdiction over the person is waived if omitted from the first motion made under this rule, or if it is not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

**Application of Waiver Provisions of Rule.** — The waiver provisions of this rule apply only to those motions enumerated under 12(b) and not excepted under 12(h). Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

**Waiver under Section (h) Not Applicable to Motion for Enlargement of Time.** — While section (h) provides for waiver of the defense of improper venue when not joined in a motion made under this rule, this waiver is not applicable to a motion for enlargement of time made under Rule 6. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**Defense Not Waived by Request under Rule 6(b) for Enlargement of Time.** — The defense of lack of jurisdiction over the person is not waived by a defendant's request under Rule 6(b) for an enlargement of time. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

Defendant's motion for an extension of time in no way waived his right to make any of the defenses allowed by motion under section (b). Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**But Voluntary Appearance Constitutes Waiver.** — Nothing in the language of this rule prevents a defendant, prior to filing answer or motion in which he could set up a section (b) defense, from submitting himself to the jurisdiction of the court in which an action has been filed against him by formally entering his voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some other manner inconsistent with the defense that the court has no jurisdiction over him, and once a defendant has submitted himself to the jurisdiction of the court by such conduct the defense of lack of jurisdiction over his person is no longer available to him. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

After a defendant has submitted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert the defense that the court has no jurisdiction over his person either by motion or answer under section (b). Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

A defendant who, before asserting his defense that the court has no jurisdiction over his person by answer or pre-answer motion under sections (b), (g), and (h)(1), secures an enlargement of time in which to plead, is making a general appearance, thereby submitting to the court's jurisdiction and obviating the necessity of any service of summons. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

**This rule eliminated the special appearance** and, in lieu thereof, gave a defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer even though a defendant makes a general appearance when he files an answer. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**This rule and § 1-75.7 must be construed together** since they are a part of the same enactment. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**Rule Does Not Abolish Concept of Voluntary Appearance.** — When this rule and § 1-75.7 are construed together, it is apparent that this rule does not abolish the concept of the voluntary or general appearance. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

**Jurisdiction Decided Without Reference to Voluntary Appearance.** — This rule requires the court to decide without reference to the voluntary appearance the question of jurisdiction, and, if the question is decided in the defendant's favor, to refrain from further exercising over him the power which his appearance has given it. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972).

**Venue Is Not Jurisdictional.** — The principle that venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner appears to be fully supported by section (b) and section (h)(1) of this rule. Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

**Defense of improper venue may be raised in the answer if no pre-answer motions have been** made. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

**Where a motion asserting improper venue is made in writing and in apt time,** the question of removal becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

In the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

**Where there was no valid service of process,** the court acquired no jurisdiction over defendant and defendant's motion to dismiss under this rule on jurisdictional grounds should have been allowed. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

**Failure to State Claim May Be Asserted in Responsive Pleading or by Motion.** — When a pleader has failed to state a claim upon which relief can be granted, his adversary is permitted by section (b)(6) of this rule to assert this defense either in a responsive pleading or by motion to dismiss. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

**When Motion under Section (b)(6) Can Be Made.** — A motion to dismiss for failure to state a claim upon which relief may be granted, under section (b)(6) of this rule can be made as late as trial upon the merits. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**A motion under section (b)(6) cannot be raised for the first time on appeal.** Collyer v. Bell, 12 N.C. App. 653, 184 S.E.2d 414 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

Where there has been a trial, a party cannot on appeal interpose the defense that the complaint fails to state a claim upon which relief can be granted. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**And ordinarily no appeal lies from a denial of a motion to dismiss.** Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Motion under Section (b)(6) Is Modern Equivalent of Demurrer.** — A motion to dismiss for failure to state a claim upon which relief can be granted is the modern equivalent of a demurrer. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

**Thus, Demurrer Can Be Treated as Motion under Section (b)(6).** — The demurrer can be treated as a motion to dismiss under section (b)(6) of this rule, and it can be considered whether a plaintiff has stated in his complaint "a claim upon which relief can be granted." Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

The trial court did not err in considering demurrers filed prior to the effective date of the new Rules of Civil Procedure as motions under section (b)(6) of this rule where plaintiff was not taken by surprise because the grounds stated in the demurrers were grounds covered by the rule. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

**Motion to Dismiss under Section (b)(6) Performs Same Function as Demurrer.** — The motion to dismiss under section (b)(6) performs substantially the same function as the old common-law general demurrer. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974).

A motion under section (b)(6) of this rule performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

**And Will Only Be Allowed when Demurrer Would Have Been Sustained.** — The motion to dismiss will only be allowed when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

**Former Procedure as to Demurrer.** — Under former procedure, defendant, by answering the complaint, did not waive the right to demur for failure of the complaint to state a cause of action, or for its statement of a defective cause of action. Demurrer ore tenus on this ground could be interposed at any time before final judgment, even in the Supreme Court on appeal. Under the former procedure, the appellate court could take cognizance of the complaint's deficiency ex mero motu. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**Section (b)(6) is an analogue to section (f), and the same tests as to legal principles apply.** Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

**The test on a motion to dismiss for failure to state a claim** upon which relief can be granted is whether the pleading is legally sufficient. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Trial court is required to make findings of fact and conclusions of law** on a motion to dismiss only when required by statute or requested by a party. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**Allegations Treated as True.** — For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

In considering a motion to dismiss for failure to state a claim upon which relief can be granted under section (b)(6), the allegations of the complaint are taken as true. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

**Sufficiency of Complaint.** — A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial. Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Lewis v. Gastonia Air Serv., Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972).

Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. Mere vagueness or lack of detail is not ground for a motion to dismiss. Such a deficiency should be attacked by a motion for a more definite statement. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

It is error to grant defendant's motion to dismiss plaintiff's claim where no insurmountable bar to recovery appears on the face of the complaint and the complaint contains a statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement. Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975).

The court's concern in analyzing a complaint in terms of a motion under section (b)(6) of this rule is not whether the complaint states a claim upon which relief can be granted on the alleged theory of breach of contract, but rather whether the complaint when liberally construed states a claim for plaintiff in the case against defendant upon which relief can be granted on any theory. Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975).

Detailed fact pleading is not required. A pleading is sufficient if it gives enough notice of the events or transactions that produced the claim to enable the adverse party to understand the nature and basis of the claim, to file a responsive pleading, and, by using the rules provided for discovery, to get additional information needed for trial. North Carolina Nat'l Bank v. Wallens, 31 N.C. App. 721, 230 S.E.2d 690 (1976).

**Claim should not be dismissed unless it appears that plaintiff is entitled to no relief under any state of facts** which could be proved in support of the claim. Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972); Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. North Carolina Nat'l Bank v. Wallens, 31 N.C. App. 721, 230 S.E.2d 690 (1976).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

**Concept of "Defective Statement of a Good Cause of Action" Abolished.** — When Rule 7(c) abolished demurrers and decreed that pleas "for insufficiency shall not be used," it also abolished the concept of "a defective statement of a good cause of action." Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

**Thus, Motion to Dismiss May Be Successfully Interposed to Defective Claim.** — Generally speaking, the motion to dismiss under section (b)(6) of this rule may be successfully interposed to a complaint which states a defective claim or cause of action. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

Section (b)(6) of this rule permits a motion to dismiss upon the ground that the complaint states a defective claim or cause of action. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**But Not to Defective Statement of Good Claim.** — The motion to dismiss under section (b)(6) of this rule may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action." For such complaint, other provisions of this rule, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

Section (b)(6) of this rule does not permit a motion to dismiss upon the ground that the complaint contains a defective statement of a good cause of action, relief for that defect being available under other sections of this rule. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

**Complaint without Merit May Be Dismissed.** — A complaint may be dismissed on motion filed under section (b)(6) of this rule if it is clearly without merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or absence of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

A complaint may be dismissed on motion filed under section (b)(6) where it pleads facts which will necessarily defeat the claim. Powell v.

County of Haywood, 15 N.C. App. 109, 189 S.E.2d 785 (1972).

This rule provides that a complaint must be dismissed when on its face it appears that no law supports it, that some fact essential to it is missing or that some disclosed fact necessarily defeats it. Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

**But Complaint Meeting Basic Requirements of Rule 8, etc., May Not.** — If a complaint meets the basic requirements set forth in Rule 8 and does not show upon its face that there is an insurmountable bar to recovery on the claim alleged, it is not subject to dismissal under section (b)(6). Patterson v. Weatherspoon, 17 N.C. App. 236, 193 S.E.2d 585 (1972).

**A suit against the State for breach of contract** may not be dismissed under section (b) of this rule on the ground of sovereign immunity, where the State, through its authorized officers or agencies, has entered into a valid contract and thereby consented to be sued for damages on the contract in the event it breaches the contract. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**If the complaint discloses an unconditional affirmative defense** which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed. Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

**Plaintiff without Standing Fails to State a Claim.** — Since a wrongful death action may be brought only "by the executor, administrator or collector of the decedent" under § 28-173, the plaintiff, who was the adopted daughter of the decedent, could not maintain the action in her own name, and therefore it was held that she failed to state a claim upon which relief could be granted, and the order dismissing her action under this rule was affirmed. Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43, cert. denied, 278 N.C. 703, 181 S.E.2d 603 (1971).

**Where a petition requested relief not authorized by statute, the petition stated a defective claim** in that it requested relief the court was powerless to grant regardless of what facts could be proved; and thus a motion to dismiss was properly granted. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

**Motion to Quash for Fatal Variance.** — Where pursuant to Rule 4(i) original and duplicate copies of a summons directs defendant to appear in one county but the action is actually pending in another county, this constitutes a fatal variance which may not be corrected by amendment, and a motion to quash under this rule should be allowed. Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974).

**For the purpose of the motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted;** but conclusions of law or unwarranted deductions of fact are not admitted. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Motions under sections (b)(6) and (c) of this rule can be treated as summary judgment motions,** the difference being that under sections (b)(6) and (c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

By the provisions of section (b) itself, matters outside the pleading may be presented to the court and considered by it on a motion to dismiss under section (b)(6), in which case the motion will be treated as one for summary judgment under Rule 56. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

**Motions Considered as Though Made under Section (c).** — Where the record on appeal contains no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base decision, motions purportedly made under Rule 56 relating to summary judgments will be considered as though made under section (c) for judgment on the pleadings. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

**Denial of Motion under Section (b)(6) Does Not Prevent Later Summary Judgment.** — The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which merely challenges the sufficiency of the complaint, does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Remedy for Failure to Join Necessary Party Is Motion to Dismiss.** — Summary judgment is not a proper remedy for failure to join a necessary party. Rather a motion to dismiss for failure to join a necessary party would be proper. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

**Court First Decides Whether Absent Party Should Be Joined.** — When faced with a motion under section (b)(7), the court will decide if the absent party should be joined as a party. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**If it decides in the affirmative, the court will order him brought into the action.** Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Procedure Where Absentee Cannot Be Joined.** — If the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Under section (b)(7) dismissal is appropriate where the party ordered joined is not subject to the court's jurisdiction.** Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**A dismissal under section (b)(7) is not considered to be on the merits and is without prejudice.** Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Dismissal for failure to join a necessary party or a proper party which the court, in its discretion, decides should be joined is not a dismissal on the merits and may not be with prejudice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Under section (b), every defense, including a defense in the nature of the old plea in abatement, may be raised by responsive pleading.** Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

**A similar action pending in the courts of any other jurisdiction will not abate an action between the same parties in the North Carolina courts** if raised as a defense under section (b). Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

**But Court in Second Forum May Stay or Continue Action.** — A prior action pending outside the jurisdiction, if raised as a defense under section (b), is not grounds for the abatement of an action begun in the courts of the state in question, but this does not preclude the court in the second forum from staying or continuing the progress of the second action pending determination of the first. Such a stay or continuance is discretionary and not a matter or right. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

**Appellate Consideration of Motion for Judgment on Pleadings.** — Defendant's motion for judgment on the pleadings was passed upon by the appellate court in light of the evidence presented at the trial and the amendment to the complaint which was allowed by the trial court. Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972).

**Section (c) is identical to its federal counterpart.** Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

**And Operates Same as under Code System.** — Motion for judgment on the pleadings operates substantially the same as under the code system before adoption of the new rules of civil procedure. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

**Function of section (c)** is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

**Judgment on the pleadings under section (c) is not favored** by the law, and the nonmovant's pleadings will be liberally construed. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**And is not appropriate merely because the claimant's case is weak** and he is unlikely to prevail on the merits. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**Judgment on the pleadings is proper only when pleadings fail to present any issue of fact** for the jury. Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975).

When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

A motion for judgment on the pleadings pursuant to section (c) should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. American Bank & Trust Co. v. Elzey, 26 N.C. App. 29, 214 S.E.2d 800, cert. denied, 288 N.C. 252, 217 S.E.2d 662 (1975); J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976).

The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. Cline v. Seagle, 27 N.C. App. 200, 218 S.E.2d 480 (1975).

**When a party moves for judgment on the pleadings, he admits two things** for the purpose of his motion, namely: (1) the truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations insofar as they are controverted by the pleading of his adversary. Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975).

**Allegations in Nonmovant's Pleadings Deemed Admitted.** — All allegations in the nonmovant's pleadings except conclusions of law, legally impossible facts and matters not admissible in evidence at the trial are deemed admitted by the movant for purposes of the motion. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

All well-pleaded factual allegations in the nonmoving party's pleadings are taken as true, and all contravening assertions in the movant's pleadings are taken as false. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

Upon a motion for judgment on the pleadings under section (c) the allegations of the nonmovant are taken as true and all contravening assertions of the movant are taken as false. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**And facts and permissible inferences are viewed in the light most favorable to nonmoving party.** Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. American Bank & Trust Co. v. Elzey, 26 N.C. App. 29, 214 S.E.2d 800, cert. denied, 288 N.C. 252, 217 S.E.2d 662 (1975).

Upon a motion for judgment on the pleadings under section (c), the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**Movant under section (c) is held to a strict standard** and must show that no material issue of fact exists and that he is clearly entitled to judgment. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

**Under section (c) the court is not required to find facts** in a judgment on the pleadings since the facts determining disposition are those alleged in the pleadings; and the court cannot select some of the alleged facts as a basis for granting the motion on the pleadings if other allegations, together with the selected facts, establish material issues of fact. J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976).

**Motion for Judgment on Pleadings Treated as Summary Judgment Motion.** — A motion for judgment on the pleadings is inappropriate where the complaint is not fatally defective and matters outside the pleadings are presented to and considered by the court; under such circumstances the motion for judgment on the pleadings must be treated as a motion for summary judgment. Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

**Motion under section (f) is device to test legal sufficiency of an affirmative defense.** First-Citizens Bank & Trust Co. v. Akelaitis, 25 N.C. App. 522, 214 S.E.2d 281 (1975).

**Section (f) requires that a motion to strike be made before responding** to a pleading. Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

**Applied** in Haddock v. Lassiter, 8 N.C. App. 243, 174 S.E.2d 50 (1970); Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Yancey v. Watkins, 12 N.C. App. 140, 182 S.E.2d 605 (1971); Evans v. Rose, 12 N.C. App. 165, 182 S.E.2d 591 (1971); Barker v. Hicks, 12 N.C. App. 407, 183 S.E.2d 431 (1971); Jaynes v. Lawing, 12 N.C. App. 682, 184 S.E.2d 373 (1971); Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972); FCX, Inc. v. Bailey, 14 N.C. App. 149, 187 S.E.2d 381 (1972); Oliver v. Ernul, 14 N.C. App. 540, 188 S.E.2d 679 (1972); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1972); Roth v. Parsons, 16 N.C. App. 646, 192 S.E.2d 659 (1972); Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972); Brantley v. Dunstan, 17 N.C. App. 19, 193 S.E.2d 423 (1972); Real Estate Exch. & Investors, Inc. v. Tongue, 17 N.C. App. 575, 194 S.E.2d 873 (1973); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); Clouse v. Chairtown Motors, Inc., 17 N.C. App. 669, 195 S.E.2d 327 (1973); Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973); Westmoreland v. Safe Bus, Inc., 20 N.C. App. 632, 202 S.E.2d 605 (1974); Town of Wadesboro v. Holshouser, 22 N.C. App. 65, 205 S.E.2d 550 (1974); Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974); Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974); Peace v. Peace Broadcasting Corp., 22 N.C. App. 631, 207 S.E.2d 288 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Sides v. Cabarrus Mem. Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); Wall v. Wall, 24 N.C. App. 725, 212 S.E.2d 238 (1975); Shaw v. Shaw, 25 N.C. App. 53, 212 S.E.2d 222 (1975); William R. Andrews Assocs. v. Sodibar Systems, 25 N.C. App. 372, 213 S.E.2d 411 (1975); Aydin Corp. v. International Tel. & Tel. Corp., 25 N.C. App. 427, 213 S.E.2d 582 (1975); Sims v. Rea Constr. Co., 25 N.C. App. 472, 213 S.E.2d 398 (1975); Carding Specialists (Can.), Ltd. v. Gunter & Cooke, Inc., 25 N.C. App. 491, 214 S.E.2d 233 (1975); Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975); Durham v. Creech, 25 N.C. App. 721, 214 S.E.2d 612 (1975); Smith v. Ford Motor Co., 26 N.C. App. 181, 215 S.E.2d 376 (1975); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); In re Will of Edgerton, 26 N.C. App. 471, 216 S.E.2d 476 (1975); Cole v. Earon, 26 N.C. App. 502, 216 S.E.2d 422 (1975); Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 219 S.E.2d 242 (1975); Grissom v. North Carolina Dep't of Revenue, 28 N.C. App. 277, 220 S.E.2d 872 (1976); Gibson v. Campbell, 28 N.C. App. 653, 222 S.E.2d 449 (1976); William R. Andrews Associates v. Sodibar Sys. of D.C., Inc., 28 N.C. App. 663, 222 S.E.2d 922 (1976); Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976); Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292 (1976); Church v. Madison County Bd. of Educ., 31 N.C. App. 641, 230 S.E.2d 769 (1976); RGK, Inc. v. United States Fid. & Guar. Co., 31 N.C. App. 708, 230 S.E.2d 600 (1976); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977).

**Stated** in Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972); Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971);

Johnson v. Hooks, 21 N.C. App. 585, 205 S.E.2d 796 (1974); Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243 (1976); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

**Cited** in In re Estate of Davis, 7 N.C. App. 697, 173 S.E.2d 620 (1970); Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970); Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970); North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971);Robinson v. McAdams, 11 N.C. App. 105, 180 S.E.2d 399 (1971); Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972); Appalachian S., Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15 (1971); Lane v. Faust, 11 N.C. App. 717, 182 S.E.2d 281 (1971); Galligan v. Smith, 14 N.C. App. 220, 188 S.E.2d 31 (1972); Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972); Reeves Bros. v. Town of Rutherfordton, 282 N.C. 559, 194 S.E.2d 129 (1973); Hargett v. Gastonia Air Serv., Inc., 16 N.C. App. 321, 192 S.E.2d 95 (1972); Turner v. Weber, 16 N.C. App. 574, 192 S.E.2d 601 (1972); Bell v. Traders & Mechanics Ins. Co., 16 N.C. App. 591, 192 S.E.2d 711 (1972); In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974); Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230 (1974); Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201 (1974); Nelson v. Comer, 21 N.C. App. 636, 205 S.E.2d 537 (1974); Board of Transp. v. Harrison, 22 N.C. App. 193, 205 S.E.2d 751 (1974); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975); Christopher v. Bruce-Terminix Co., 26 N.C. App. 520, 216 S.E.2d 375 (1975); North Carolina Nat'l Bank v. Wallens, 26 N.C. App. 580, 217 S.E.2d 12 (1975); Newton v. Standard Fire Ins. Co., 27 N.C. App. 168, 218 S.E.2d 231 (1975); Mozingo v. North Carolina Nat'l Bank, 27 N.C. App. 196, 218 S.E.2d 506 (1975); Smith's Cycles, Inc. v. Alexander, 27 N.C. App. 382, 219 S.E.2d 282 (1975); SCM Corp., Glidden-Durkee Div. v. Federal Constr. Co., 29 N.C. App. 592, 225 S.E.2d 162 (1976); Powell Mfg. Co. v. Harrington Mfg. Co., 30 N.C. App. 97, 226 S.E.2d 173 (1976); Carl Rose & Sons Ready Mix Concrete v. Thorp Sales Corp., 30 N.C. App. 526, 227 S.E.2d 301 (1976); Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977); Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977); Christenbury v. Hedrick, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

## Rule 13. Counterclaim and crossclaim.

**Editor's Note. —**

For note on relation back of barred counterclaims under Rule 13(f), see 49 N.C.L. Rev. 134 (1970).

**The term "at the time the action was commenced"** as used in section (a)(1) refers to the action against which the pleader is required to counterclaim, and not necessarily the primary action originally commencing the lawsuit. Faggart v. Biggers, 18 N.C. App. 366, 197 S.E.2d 75 (1973).

**Compulsory Counterclaim Not Limited to Facts Alleged in Original Complaint. —** A compulsory counterclaim under section (a) is not limited to facts alleged in the original complaint, but includes logically related acts and conduct involving the parties. Powell Mfg. Co. v. Harrington Mfg. Co., 30 N.C. App. 97, 226 S.E.2d 173, cert. granted, 290 N.C. 662, 228 S.E.2d 454 (1976).

**Assertion of Counterclaim Maturing after Original Answer Not Mandatory. —** Although section (e) permits the court to allow a supplemental pleading to assert a counterclaim, matured or acquired, subsequent to the original answer, such supplemental pleading is not mandated and failure to do so will not bar the claim. Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976).

**Answer Treated as Counterclaim. —** In a suit for absolute divorce where defendant admits the allegations of the complaint and prays for an absolute divorce on the same grounds, the fact that defendant's pleading is labelled an "answer" does not preclude its being treated also as a counterclaim. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Where the defendant institutes a cross claim and a third-party action,** the court should look to the times of filing such cross claim and third-party action to determine whether, at those times, there was pending an action whose claim involved the same subject matter as that of the proposed counterclaims. Faggart v. Biggers, 18 N.C. App. 366, 197 S.E.2d 75, cert. denied, 283 N.C. 752, 198 S.E.2d 721 (1973).

**Applied** in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975);

Thompson v. Thompson, 26 N.C. App. 496, 216 S.E.2d 376 (1975).

**Cited** in Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969); Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

## Rule 14. Third-party practice.

(c) *Rule applicable to State of North Carolina.* — Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third-party plaintiff under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act. (1967, c. 954, s. 1; 1969, c. 810, s. 2; 1975, c. 587, s. 1.)

**Editor's Note.** —

The 1975 amendment, effective July 1, 1975, added section (c). Section 3 of the amendatory act provides that it shall not affect pending litigation.

As the rest of this rule was not changed by the amendment, only section (c) is set out.

For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970). For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Purpose.** — The purpose of this rule is to promote judicial efficiency and the convenience of parties by eliminating circuity of action. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

This rule is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

**This rule does not create any substantive rights where none existed before.** Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

**Thus, allowing a defendant indemnitee to implead a third-party defendant before the indemnitee has paid the debt** owing to the plaintiff does not create any new substantive rights in the indemnitee. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

**But a cause of action now arises in the indemnitee** where he impleads a third-party defendant before he pays the claim for which the indemnitor must reimburse him. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

**Where circumstances require separate trials after an impleader** under this rule, the better practice is to try the principal action first. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

**Applied** in Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663 (1972); Smith v. Garrett, 32 N.C. App. 108, 230 S.E.2d 775 (1977).

**Cited** in Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969); Abdella v. Stringfellow, 8 N.C. App. 480, 174 S.E.2d 661 (1970).

## Rule 15. Amended and supplemental pleadings.

**Editor's Note.** —

For note on specificity in pleading under North Carolina Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970). For note on relation back of barred counterclaims under Rule 13(f), see 49 N.C.L. Rev. 134 (1970). For comment, "Rule 15 of the new Rules of Civil Procedure: Method of Amending Complaints," see 7 Wake Forest L. Rev. 641 (1971).

For a detailed analytic discussion of section (b) of this rule, see 12 Wake Forest L. Rev. 405 (1976).

**This rule reflects the general policy of proceeding to the merits** of an action. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**The rules achieve their purpose of insuring a speedy trial on the merits** of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under section (a), by pretrial order under Rule 16, during and after reception of evidence under section (b), and after entry of judgment under section (b) and Rules 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

The Rules of Civil Procedure achieve their purpose of assuring a speedy trial by providing for and encouraging liberal amendments to the pleadings under this rule. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Absent Amendment, Trial Must Proceed within Issues Raised by Pleadings.** — Under these rules the trial must proceed within the issues raised by the broad pleadings unless the pleadings are amended. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**But the thrust of this rule seems to destroy the former strict code doctrine of variance** by allowing issues to be raised by liberal amendments to pleadings and, in some cases, by the evidence. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Under the new Rules of Civil Procedure, the significance of the doctrine of variance has been drastically reduced. Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

**The filing of a reply is not an amendment to the pleadings.** Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

**This rule contemplates liberality** on the part of the court in allowing amendments to the pleadings. Performance Motors, Inc. v. Allen, 20 N.C. App. 445, 201 S.E.2d 513 (1974).

**Amendments should always be freely allowed unless some material prejudice is demonstrated,** for it is the essence of the rules that decisions be had on the merits and not avoided on the basis of mere technicalities. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

The court has authority under section (b) of this rule to permit an amendment to the pleadings at any time when there is no material prejudice to the opposing party and such amendment will serve to present the action on its merits. Clark v. Barber, 20 N.C. App. 603, 202 S.E.2d 347 (1974).

**If No Objection to Variance, Pleadings Are Deemed Amended.** — Under this rule, when the plaintiff offers evidence at trial which varies from his complaint and introduces a new issue, the defendant may object; if the defendant does not object, he is viewed as having consented to admission of the evidence, and the pleadings are deemed amended to include the new issue. Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

**Burden of Party Objecting to Amendment.** — The party objecting to an amendment has the burden to specify the grounds of objection and to satisfy the court that he will be prejudiced by the admission of the evidence or by litigation of the issues raised by the evidence. The objecting party must meet these requirements in order to avoid "litigation by consent" or allowance of motion to amend. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

If the defendant objects to evidence at trial which varies the complaint and introduces a new issue, he has the burden of proving that he would be prejudiced by admission of the varying evidence. Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

Leave to amend should be freely given when justice so requires and the burden is on the party objecting to the amendment to show that he would be prejudiced thereby. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

**The judge, etc. —**

The trial court has broad discretion in permitting or denying amendments. Helson's Premiums & Gifts, Inc. v. Duncan, 9 N.C. App. 653, 177 S.E.2d 428 (1970); Galligan v. Smith, 14 N.C. App. 220, 188 S.E.2d 31 (1972).

A motion for leave to file an amended complaint is addressed to the discretion of the trial court. Flores v. Caldwell, 14 N.C. App. 144, 187 S.E.2d 377 (1972).

A motion to amend the pleadings is addressed to the discretion of the trial judge, and is not reviewable on appeal in the absence of a showing of an abuse of discretion. Mangum v. Surles, 12 N.C. App. 547, 183 S.E.2d 839 (1971), rev'd on other grounds, 281 N.C. 91, 187 S.E.2d 699 (1972).

In a motion to amend addressed to the sound discretion of the trial judge, the trial court has broad discretion in permitting or denying amendments. Markham v. Johnson, 15 N.C. App. 139, 189 S.E.2d 588, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972).

This rule provides for broad discretion on the part of the court in allowing motions to amend complaint after answer is filed. Forbes v. Pillmon, 18 N.C. App. 439, 197 S.E.2d 226 (1973).

**Judge May Not Strike Motion Already Allowed by Another Judge.** — When one judge allows a motion to amend a pleading in his discretion and the amendment is made in accordance with the authority granted, a second judge may not strike it on the ground that the first erred in allowing it. He is under the necessity of observing the terms of the judgment allowing the party to amend. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

**Nor, Absent Changed Conditions, Allow Motion Already Denied.** — When one superior court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions, another superior court judge may not thereafter allow the motion. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

**But Previous Denial Does Not Bar Later Motion to Another Judge.** — When a judge in his discretion denies a motion to amend pleadings, or for a bill of particulars, his order of denial is no bar to a subsequent motion or application for the same relief to another judge. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

**Denial of plaintiff's motion to strike defendant's amended answer** is tantamount to permitting defendant to file the amended answer. Performance Motors, Inc. v. Allen, 20 N.C. App. 445, 201 S.E.2d 513 (1974).

**The court in its discretion, etc. —**

The trial judge does not commit error in permitting defendants to amend their answer to conform to the evidence after the evidence on both sides is in and after the parties have argued the case to the jury. Reid v. Consolidated Bus Lines, 16 N.C. App. 186, 191 S.E.2d 247 (1972).

**Section (b) of this rule is essentially a verbatim copy of federal Rule 15(b)**; so federal decisions interpreting this rule are apposite. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

**Section (b) was enacted to eliminate waste, delay, and injustice** which sometimes resulted from belated confrontations between insufficient allegations and plenary proof. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

**This rule does not permit judgment by ambush.** Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975).

**The purpose of an amendment to conform to proof** is to bring the pleadings in line with the actual issues upon which the case was tried. Fowler v. Johnson, 18 N.C. App. 707, 198 S.E.2d 4 (1973); Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975).

**Amendment which brings in some entirely extrinsic issue or changes the theory** on which the case was actually tried is not permissible, even though there is evidence in the record, introduced as relevant to some other issue, which would support the amendment. Fowler v. Johnson, 18 N.C. App. 707, 198 S.E.2d 4 (1973); Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975).

**The pleadings are regarded as amended to conform to the proof** even though the defaulting pleader makes no formal motion to amend. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

When not raised by the pleading, the issue of usury may still be tried if raised by the express or implied consent of the parties at trial. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 703 (1976).

**In order for pleadings to be amended to conform to the proof** pursuant to this rule, there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975).

**The effect of this rule is to allow amendment by implied consent** to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

A party who fails to object to evidence is initially presumed to have given implied consent by silence. He can avoid this only by satisfying the court that under the circumstances, his consent to having certain issues considered by the trier of fact should not be implied from his failure to object to particular evidence. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Under section (b) the rule of "litigation by consent" is applied when no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings. In such case the rule amends the pleadings to conform to the evidence and allows any issue raised by the evidence to go to the jury. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Where no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for determination. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

In an action to recover for injuries sustained when a golf cart plaintiff had rented from defendants rolled backwards down a hill and overturned while being operated by plaintiff, wherein plaintiff alleged that defendants were negligent in failing to warn him of defective brakes on the golf cart, the pleadings were amended by implied consent to conform to the evidence and broaden the issue of negligence so that the jury could consider whether defendants breached a duty to plaintiff by furnishing a golf cart which they knew had no brakes on it when going backwards, where defendants failed to object to plaintiff's testimony outside the pleadings that the individual defendant told him at the accident scene that defendants' golf carts had no brakes on them while going backwards. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Where, in an action to set aside a deed, plaintiff introduced evidence not supported by the pleadings that defendants fraudulently induced her to sign the deed by representing the instrument to be a note, and defendants failed to object to such evidence on the ground that it was outside the issues raised by the pleadings, plaintiff was entitled as a matter of law to have the issue of fraud submitted to the jury and to amend her complaint to conform her pleadings to the evidence. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Where the record disclosed that the case was tried as though the statute of frauds was properly pleaded, section (b) of this rule applied and the appeal was treated as though the statute of frauds was properly pleaded. Bercegeay v. Surfside Realty Co., 16 N.C. App. 718, 193 S.E.2d 356 (1972).

**Better Practice Is Motion for Leave to Amend.** — Better practice dictates that even where pleadings are deemed amended under the theory of litigation by consent, the party receiving the benefit of the rule should move for leave of court to amend, so that the pleadings will actually reflect the theory of recovery. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

**But failure to make the amendment will not jeopardize a verdict** or judgment based upon competent evidence. If an amendment to conform the pleadings to the proof should have been made in order to support the judgment, the appellate court will presume it to have been made. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Where an issue not raised by the pleadings has been tried by express or implied consent, answered by the jury or the judge, and the judgment rendered on the verdict has been affirmed on appeal, the failure to amend should not, and does not, affect the results of the trial which has been had upon the merits. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

**Implied-consent principle would not apply where omitted allegation was necessary to confer jurisdiction.** Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, modified on other grounds, 288 N.C. 71, 215 S.E.2d 782 (1975).

**Section (c) Is More Liberal than Comparable Federal Rule.** — Section (c) is more liberal in allowing amendments than the comparable federal rule. In North Carolina even a new cause of action can be said to relate back for amendment purposes. Humphries v. Going, 59 F.R.D. 583 (E.D.N.C. 1973).

**The distinction between supplemental pleadings and amendments** is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented; whereas, amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Supplemental Pleading Not a Matter of Right.** — The language of this rule "... the court may ... upon such terms as are just ..." permits but does not require a trial court to allow a supplemental pleading. In any event, it does not appear to be a matter of right, and it seems clear that a court may deny a supplemental pleading to substitute parties if the allowance of such a pleading would be unjust. Deutsch v. Fisher, 32 N.C. App. 688, 233 S.E.2d 646 (1977).

**Relation Back of Supplementary Pleadings.** — There can be no relation back of supplementary pleadings where at the time the suits were instituted no actionable damages existed, nor did the claims alleged become actionable within the time provided by statute for the instituting of suits in slander actions. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

The case law is not clearly developed on the extent to which a supplemental complaint will be held to relate back for statute of limitations purposes. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Amendment Should Actually Be Made Where Retrial Is Ordered.** — When a retrial is ordered for failure to submit the issues raised by the evidence but not by the pleadings, failure of the court to allow an amendment in order to conform the pleadings to the proof, or when a dismissal or directed verdict is erroneously entered upon the ground of a fatal variance between allegation and proof, orderly procedure, compliance with Rule 9(b), and good technique require that the amendment actually be made. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

**Amendment of Pleadings to Conform to Evidence Admitted over Objection.** — This rule permits amendment of pleadings to conform to the evidence even where the evidence is admitted over objection. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

Even when the evidence is objected to on the ground that it is not within the issue raised by the pleadings, the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**Amendment to Update Amount of Arrearage under Contract.** — Where the amount of defendant's arrearage under a contract was an issue raised by the pleadings, and since an amendment only served to bring the cause of action up-to-date, it was not error for the trial judge either to permit the plaintiff to introduce evidence of defendant's arrearage between the date she filed and the date of the trial or to allow the plaintiff to "amend" her complaint to include the additional amount owed to her. McKnight v. McKnight, 25 N.C. App. 246, 212 S.E.2d 902, cert. denied, 287 N.C. 466, 215 S.E.2d 624 (1975).

**Rule Applies to Motions.** — The philosophy of this rule should apply not only to pleadings but also to motions where there is no material prejudice to the opposing party. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Notice of Motion to Add Defendant.** — If an order allowing amendment and adding a party defendant is void for lack of notice to the original defendant, it is void for all purposes. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

**Applied** in Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); Williams v. Nationwide Ins. Co., 12 N.C. App. 131, 182 S.E.2d 653 (1971); Southwire Co. v. Long Mfg. Co., 12 N.C. App. 335, 183 S.E.2d 253 (1971); Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971); Davis v. Connell, 14 N.C. App. 23, 187 S.E.2d 360 (1972); McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971); Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Windfield Corp. v. McCallum Inspection Co., 18 N.C. App. 168, 196 S.E.2d 607 (1973); McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975); Andrews v. North Carolina Farm Bureau Mut. Ins. Co., 26 N.C. App. 163, 215 S.E.2d 373 (1975); Philco Fin. Corp. v. Mitchell, 26 N.C. App. 264, 215 S.E.2d 823 (1975); Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975); Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976); Johnson v. Austin, 29 N.C. App. 415, 224 S.E.2d 293 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); McRae v. Moore, 33 N.C. App. 116, 234 S.E.2d 419 (1977).

**Quoted** in Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

**Cited** in Magnolia Apts., Inc. v. Hanes, 8 N.C. App. 394, 174 S.E.2d 828 (1970); Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Livengood v. Piedmont & N. Ry., 18 N.C. App. 352, 197 S.E.2d 66 (1973); Thacker v. Harris, 22 N.C. App. 103, 205 S.E.2d 744 (1974); Brown v. Moore, 286 N.C. 664, 213 S.E.2d 342 (1975); Griffeth v. Watts, 24 N.C. App. 440, 210 S.E.2d 902 (1975); Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154 (1975); McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976); Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976); Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

## Rule 16. Pretrial procedure; formulating issues.

**The rules achieve their purpose of insuring a speedy trial on the merits** of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under Rule 15(a), by pretrial order under this rule, during and after reception of evidence under Rule 15(b), and after entry of judgment under Rules 15(b), 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**Applied** in Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971).

**Cited** in Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

## ARTICLE 4.

## *Parties.*

## Rule 17. Parties plaintiff and defendant; capacity.

(b) *Infants, incompetents, etc.* —

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. — In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem. The duty of the State solicitors to prosecute in the cases specified in Chapter 33 of the General Statutes, entitled "Guardian and Ward," is not affected by this section.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent

persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint were served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. — Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. — In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceedng, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. — In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written

instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) When Guardian Ad Litem Not Required in Domestic Relations Actions. — Notwithstanding any other provisions of this rule, an infant who is competent to marry, and who is 18 years of age or older, is competent to prosecute or defend an action or proceeding for his or her absolute divorce, divorce from bed and board, alimony pendente lite, permanent alimony with or without divorce, or an action or proceeding for the custody and support of his or her child, without the appointment of a guardian ad litem.

(7) Miscellaneous Provisions. — The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.* — When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication,

whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(1971, c. 1156, ss. 3, 4; 1973, c. 1199.)

**Editor's Note. —**

The 1971 amendment deleted "or Rule 4(j)(1)b" following "Rule 4(j)(1)a" in subsection (2) of section (c). The amendment also deleted "at any time after the filing of the affidavit required by Rule 4(j)(1)c and" following "on its own motion" in subsection (3) of section (c).

The 1973 amendment added the second paragraph of subsection (2) of section (b).

As the rest of the rule was not changed by the amendments, only sections (b) and (c) are set out.

For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969). For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Section (a) of this rule is identical to federal Rule 17(a).** Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Rule Applies to Both Plaintiff and Defendant.** — Although this rule by its terms applies only to parties plaintiff, the rule is applicable to parties defendant as well. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977).

**A real party in interest is a party who is benefited or injured by the judgment** in the case. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977).

**And who by substantive law has the legal right to enforce the claim in question.** Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977).

**Interest in Subject Matter of Litigation Required.** — An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977).

**Real Party in Interest in Wrongful Death Action.** — In an action to recover damages for wrongful death the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator. King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973).

**Infants and persons non compos mentis are peculiarly entitled to the protection of the court.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**A principal means for extending this protection is by appointment of a guardian** or, where appropriate, a guardian ad litem. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Former Practice Changed.** — The practice which formerly prevailed in this State, that an infant plaintiff appeared by his next friend, has been changed. Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971).

**Now Infant or Incompetent Plaintiff Must Appear by Guardian.** — Now in actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, they must appear by general or testamentary guardian, if they have any within the State, or by duly appointed guardian ad litem. Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971).

**The change effected is more than a mere change in nomenclature,** since substantial differences have been recognized between the powers and duties of a next friend and those of a duly appointed guardian ad litem. Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971).

**This rule makes no reference to a "next friend,"** but provides for the appointment of a guardian or guardian ad litem for infants and incompetents who are parties, whether plaintiff or defendant, in any civil action. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**It is ordinarily desirable that an incompetent's litigation be conducted by a general guardian,** who, being in control of his ward's affairs, can relate the effect of the litigation to the incompetent's entire estate. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Jurisdiction of Court to Appoint Guardian ad Litem for Adult Plaintiff.** — An adult plaintiff who is not an idiot or lunatic must be non compos mentis before the court has jurisdiction to appoint a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Where a party in a civil action has been judicially determined or is conceded to be mentally incompetent,** the law is clear; he must be represented by a guardian or guardian ad litem. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

If a defendant in a civil action is non compos mentis, he must defend by general or testamentary guardian if he has one within the State, otherwise by guardian ad litem to be appointed by the court. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Either party, or the court upon its own motion, may initiate proceedings for the appointment** of a guardian ad litem before any hearing on the merits. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**The court may not quash the service on an incompetent.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**But the court should see to it that an incompetent is properly represented before any action is taken** which is detrimental to his interests. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Judge Must Determine Question of Competency Before Proceeding with Trial.** — If in the course of the trial of a civil action or proceeding, circumstances are brought to the attention of the trial judge which raise a substantial question as to whether a party litigant, who is not already represented by a guardian, is non compos mentis, it is the duty of the trial judge to see that proper determination of this question is made before proceeding further with the trial in any way which might prejudice the rights of such party. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

The trial court committed error in proceeding into a hearing on the merits, where the evidence bearing on the question of defendant's competency was at least sufficient to require the court to conduct a voir dire examination into the matter, preferably with the defendant present in person so that the court could observe him. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

Where circumstances arise in the course of a trial which bring into question the competence of a litigant, it is the duty of the trial judge to determine this question before proceeding. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

**Judge Determines Whether Circumstances Raise Substantial Question as to Competency.** — Whether the circumstances which are brought to the attention of the trial judge are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**In making this initial determination, normally a voir dire examination should be conducted.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Where practicable, it is preferable that the party whose competency is questioned be present** in person at the voir dire examination before the court. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**If the evidence at the voir dire examination is conflicting,** the trial judge should make findings of facts as the basis for his determination as to whether any substantial question of competency is raised. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Judge May Appoint Guardian ad Litem where Party Does Not Deny Incompetency.** — If, at the time appointed for the hearing, the party does not deny the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith, and that the party is non compos mentis, the judge may proceed to appoint a guardian ad litem to act for him. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**But Party Asserting Competency Is Entitled to Have Issue Determined as Provided in § 35-2.** — If, at the time appointed for the hearing, the party asserts his competency, he is entitled to have the issue determined as provided in § 35-2. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Such Party Is Entitled to Notice and Opportunity to Be Heard.** — When a party's lack of mental capacity is asserted and denied — and he has not previously been adjudicated incompetent to manage his affairs — he is entitled to notice and an opportunity to be heard before the judge can appoint a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Normally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit, to conduct his litigation according to his own judgment and inclination, and — if the case is to be compromised — to have it settled upon terms which are satisfactory to him. If this right is taken from him upon a factual finding which he disputes, fundamental fairness and the constitutional requirements of due process require that he be given an opportunity to defend and be heard. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

If the trial judge determines after voir dire examination that a substantial question as to the party's competency is raised, notice and opportunity to be heard must then be given the party for whom appointment of a guardian is proposed. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

A person for whom a guardian ad litem is proposed is entitled to notice as in case of an inquisition of lunacy under § 35-2. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

The trial court properly denied the motion for appointment of a guardian for the defendant, since no notice of such motion had been given to the defendant. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**And Appointment Made without Notice and Opportunity to Be Heard Is Void.** — Where the plaintiff had neither notice that her competency to manage her affairs was challenged nor an opportunity to be heard on the issue, the order appointing a guardian ad litem was void and his settlements of her actions, notwithstanding they were approved by the court, were not binding upon her. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Time for Notice.** — Section 35-2 does not specify the time for notice but, by analogy to Rule 6(d) of the Rules of Civil Procedure, five days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Test of Incompetency.** — While there are varying degrees of mental inadequacy, the law will not (and should not) deprive a person of the control of his lawsuit or his property unless he is "incompetent from want of understanding to manage his own affairs." This is the criterion fixed by § 35-2, and the word "affairs" encompasses a person's entire property and business — not just one transaction or one piece of property to which he may have a unique attachment. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

There is no completely satisfactory definition of the phrase in § 35-2, "incompetent from want of understanding to manage his own affairs." Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

The facts in every case will be different and competency or incompetency will depend upon the individual's "general frame and habit of mind." Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Under § 35-2, if a person's mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property, if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs. On the other hand, if he understands what is required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Incompetency to administer one's property depends upon the general frame and habit of mind, and not upon specific actions, such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

To authorize the appointment of a guardian ad litem, it is not enough to show that another might manage a man's property more wisely or efficiently than he himself. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Mere weakness of mind will not be sufficient** to put a person among those who are incompetent to manage their own affairs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**The power, etc.** —

A guardian ad litem has no authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**When Inquisition, etc.** —

An inquisition is not always a condition precedent for the appointment of a guardian ad litem. In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as guardian ad litem. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Where an incompetent plaintiff died after institution of action by her next friend,** and the court authorized and directed substitution of the administrator as new plaintiff, failure so to substitute requires dismissal of appeal by the court against the appellant's next friend. Ginn v. Smith, 20 N.C. App. 526, 201 S.E.2d 739 (1974).

**Third-Party Beneficiary.** — Whether a third-party beneficiary has a right of action depends upon the substantive law. The result is that if by the substantive law the beneficiary has a right of action, the beneficiary may sue, and the party with whom or in whose name the contract was made may also sue and need not join the beneficiary. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

A third-party beneficiary to a contract is entitled to maintain an action for its breach, but this rule is not applicable where the contract is not made for the direct benefit of the third party and any benefit accruing to him is merely incidental. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Ratification of Commencement of Action.** — Where counsel for the employer and his insurance carrier participated in the action as counsel for the plaintiff, that was a ratification of the commencement of the action within a reasonable time after the motion of dismissal was made. Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234, cert. denied, 279 N.C. 395, 183 S.E.2d 246 (1971).

**Applied** in McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971); Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974); Reeves v. Jurney, 29 N.C. App. 739, 225 S.E.2d 615 (1976).

## Rule 18. Joinder of claims and remedies.

**Editor's Note.** —

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Rule Does Not Apply to Counterclaims.** — This rule applies to joinder of claims and remedies and not to counterclaims, which are controlled by Rule 13. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

**Applied** in Wickes Corp. v. Hodge, 7 N.C. App. 529, 172 S.E.2d 890 (1970).

## Rule 19. Necessary joinder of parties.

**Sections (a) and (b) make no substantive change in the rules relating to joinder of parties as formerly existed.** Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**This rule makes no change in the categorizing of parties as necessary, proper and formal,** or in the underlying principles upon which the categories have been based. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**A sound criterion for deciding whether particular persons must be joined** in litigation between others appears in the definition of necessary parties as those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

**Necessary parties must be joined** in an action. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Proper parties may be joined.** Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Whether proper parties will be ordered joined rests within the sound discretion of the trial court. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Necessary Parties.** —

In accord with 1st paragraph in original. See MacPherson v. City of Asheville, 283 N.C. 299, 196 S.E.2d 200 (1973).

In accord with 3rd paragraph in original. See Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

A person is a necessary party to an action if his interest is such that no decree can be rendered which will not affect him. Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Proper Parties.** —

A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Procedure as to Motion under Rule 12 (b)(7).** — When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in section (b) of this rule, whether to proceed without him or to dismiss the action. A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Discretion of Court.** —

When not regulated by statute the procedural processes which will best promote the administration of justice are left to the judicial discretion of the trial judge. He has plenary power with respect to those who ought to be made parties to facilitate the administration of justice. Crosrol Carding Devs., Inc. v. Gunter &

Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Suit by Beneficiary of Contract.** — A party to a contract is ordinarily not a necessary party in a suit brought against the other contracting party by a beneficiary who claims the contract has been breached. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Applied** in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Munchak Corp. v. Caldwell, 25 N.C. App. 652, 214 S.E.2d 194 (1975).

**Quoted** in Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974).

**Stated** in Bowman v. Town of Granite Falls, 21 N.C. App. 333, 204 S.E.2d 239 (1974).

**Cited** in T. A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972), aff'd, 283 N.C. 129, 195 S.E.2d 552 (1973); State v. Hines, 19 N.C. App. 87, 197 S.E.2d 893 (1973); Drury v. Drury, 24 N.C. App. 246, 210 S.E.2d 282 (1974); Riggs v. R.G. Foster & Co., 24 N.C. App. 377, 210 S.E.2d 525 (1975); Northwestern Bank v. Robertson, 25 N.C. App. 424, 213 S.E.2d 363 (1975); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

## Rule 20. Permissive joinder of parties.

(a) *Permissive joinder.* — All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate trial.* — The court shall make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and shall order separate trials or make other orders to prevent delay or prejudice. (1967, c. 954, s. 1; 1973, c. 75.)

**Editor's Note.** — The 1973 amendment substituted "if" for "of" preceding "any question of law" near the end of the second sentence.

**Alternative claims may be joined under section (a) if two tests are met.** First, each claim must arise out of the same transaction, the same occurrence, or a series of either. The second test is that each claim must contain a question of law or fact, which will arise, common to all parties. Aetna Ins. Co. v. Carroll's Transfer, Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**The practical occasion for alternative joinder** is that created by uncertainty as to which of several parties is entitled to recover or is liable. Obviously uncertainty more frequently exists with respect to the person than to the person entitled; hence alternative joinder of defendants is more frequent. Aetna Ins. Co. v. Carroll's Transfer, Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**Section (b) authorizes the judge to order separate trials, or make other orders** to prevent a party from being embarrassed, delayed, or put to expense by the joinder of a party. This may be done on motion of either party, and the decision whether to do so rests in the discretion of the trial judge. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

Although the basic philosophy of the party joinder provisions is to allow relatively unrestricted initial joinder, there are provisions in section (b) of this rule, and in Rule 42(b) for the trial judge to sever and order separate trials. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**Rule 42(b) Confers Same Power Contemplated by Section (b).** — Rule 42(b), which gives to the trial judge general power to sever, confers the same power contemplated by section (b) of this rule. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**Whether or not there should be severance rests in the sound discretion of the trial judge.** Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**Dismissal of Action as to One Defendant Held Error.** — Where questions of law and fact were raised by the complaint which were common to all of the named defendants, and a justiciable controversy was asserted between the parties, and the complaint alleged that one of the defendants was a permissive and necessary party in the action, the trial judge committed error in allowing the motion of that defendant to dismiss the action as to her under Rule 41(b). First-Citizens Bank & Trust Co. v. Carr, 10 N.C. App. 610, 179 S.E.2d 838, rev'd on other grounds, 279 N.C. 539, 184 S.E.2d 268 (1971).

**Applied** in Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

**Quoted** in Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974).

**Cited** in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972), aff'd, 283 N.C. 129, 195 S.E.2d 552 (1973).

## Rule 21. Procedure upon misjoinder and nonjoinder.

**One of the purposes of this rule** is to insure that parties properly before the court may litigate their differences without being penalized by delay due to those who are not properly before the court. Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974).

**Rule Is Counterpart of Federal Rule 21.** — This rule is an exact counterpart of Federal Rule 21, except for the addition of the phrase "nor misjoinder of parties and claims," which was inserted because of the prior procedure upon "dual misjoinder"; under the prior procedure there was a misjoinder of parties and causes if any plaintiff or defendant, though interested in one or more tracts, was not interested in all tracts. Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974).

**Notice to Bring in Additional Party.** — Long prior to the adoption of this rule, North Carolina has held that existing parties to a lawsuit are entitled to notice of a motion to bring in additional parties. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

If an order allowing amendment and adding a party defendant is void for lack of notice to the original defendant, it is void for all purposes. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

The original defendant is entitled to notice of a motion to bring in a new party defendant. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

**Applied** in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972), aff'd, 283 N.C. 129, 195 S.E.2d 552 (1973).

## Rule 22. Interpleader.

**Applied** in Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

**Cited** in Travelers Ins. Co. v. Keith, 15 N.C. App. 551, 190 S.E.2d 428 (1972).

## Rule 23. Class Actions.

**Necessary Allegation.** — In order to bring a proceeding under this rule, it is necessary to make an allegation in the complaint that the defendants constituted a class so numerous as to make it impracticable to bring them all before the court. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

**Cited** in Stegall v. Hous. Auth., 278 N.C. 95, 178 S.E.2d 824 (1971); Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236 (1973); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974).

## Rule 24. Intervention.

**Editor's Note.** —

For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cen. L.J. 347 (1976).

**Successful bidder at an auction sale may intervene** to contest a motion to enjoin conveyance of the property which was the subject of the auction sale. Northwestern Bank v. Robertson, 25 N.C. App. 424, 213 S.E.2d 363 (1975).

**Applied** in Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972).

### Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

(a) *Death.* — No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the presentation of claims in G.S. 28A-19-3, may order the substitution of said party's personal representative or collector and allow the action to be continued by or against the substituted party.

(1977, c. 446, s. 3.)

**Editor's Note.** — The 1977 amendment, effective Sept. 1, 1977, substituted "the time specified for the presentation of claims in G.S. 28A-19-3" for "one year thereafter, or afterwards on a supplemental complaint" and "collector" for "successor in interest" in the second sentence of section (a).

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

As the rest of the rule was not changed by the amendment, only section (a) is set out.

**Supplemental Pleading Must Satisfy Requirements of Rule 15 (d).** — In order for a supplemental pleading under section (a) to be procedurally proper, it must satisfy the requirements of Rule 15(d). Deutsch v. Fisher, 32 N.C. App. 688, 233 S.E.2d 646 (1977).

**Death of an Incompetent Plaintiff.** — Where an incompetent plaintiff died after institution of action by her next friend, and the court authorized and directed substitution of the administrator as new plaintiff, failure so to substitute required dismissal of appeal by the court against the appellant's next friend. Ginn v. Smith, 20 N.C. App. 526, 201 S.E.2d 739 (1974).

**Applied** in MacPherson v. City of Asheville, 283 N.C. 299, 196 S.E.2d 200 (1973).

## ARTICLE 5.

## *Depositions and Discovery.*

### Rule 26. General provisions governing discovery.

(a) *Discovery methods.* — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under section (c) of this rule, the frequency of use of these methods is not limited.

(b) *Scope of discovery.* — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. — Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the information as to which discovery is sought.

(2) Insurance Agreements. — A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation; Materials. — Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation; Experts. — Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

a. 1. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4) c of this rule, concerning fees and expenses as the court may deem appropriate.

b. Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (b)(4) a 2 of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4) a 2 of this rule the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) *Protective orders.* — Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (v) that discovery be conducted with no one present except persons designated by the court; (vi) that a deposition after being sealed be opened only by order of the court; (vii) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (viii) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and timing of discovery.* — Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. Any order or rule of court setting the time within which discovery must be completed shall be construed to fix the date after which the pendency of discovery will not be allowed to delay trial or any other proceeding before the court, but shall not be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed.

(e) *Supplementation of responses.* — A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses. (1967, c. 954, s. 1; 1971, c. 750; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d) and (e) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general.

*Section (a) — discovery devices.* — This is a new section listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provision of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

*Section (b) — scope of discovery.* — This section is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subsection (b)(1) — In General. — The language is changed to provide for the scope of discovery in general terms, rather than being limited to the scope of depositions. The subsection, although in terms applicable only to depositions, was incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or a determination of relevance for purposes of trial. The substance of the subdivision represents no substantial change from the corresponding former provision. The provision of this subsection relating to matters within the knowledge of the party conducting discovery is taken from the existing North Carolina provision. It does not appear in the federal rule.

Subsection (b)(2) — Insurance Agreements. — This represents no change from the existing North Carolina provision.

Subsection (b)(3) — Work Product. — North Carolina had adopted a version of this rule in advance of the 1970 amendments to the federal rules. The present amendment would alter the test for compelling production from "injustice or undue hardship" to "substantial need" that cannot be satisfied without "undue hardship." It would also expand the scope of the protection of mental impressions, conclusions, opinions or legal theories to those of an "other representative of a party," e.g., an insurer. The wording of this subsection varies slightly from the federal rule; the basic substance of the subsection, however, remains unchanged.

Party's Right to Own Statement. — An exception to the requirement of this subsection enables a party to secure production of his own statement without any special showing. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. E.g., Smith v. Central Linen Service Co., 39 F.R.D. 15 (D. Md. 1966); McCoy v. General Motors Corp., 33 F.R.D. 354 (W.D. Pa. 1963); Fernandes v. United Fruit Co., 50 F.R.D. 82 (D. Md. 1970).

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Section 8-89.1, which contains a similar provision whose application is restricted to personal injury plaintiffs, is repealed in connection with the enactment of this section.

Witness' Right to Own Statement. — A second exception to the requirement of this subsection permits a nonparty witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the nonparty witness.

Subsection (b)(4) — Trial Preparation; Experts. — This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subsection deals with those experts whom the party expects to call as trial witnesses. It should be noted that the subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subdivision (b)(4) a deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases.

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4) a draws no line between complex and simple cases, or between cases with many experts and those with but one. The rule established by this subdivision is patterned substantially after the result reached by a number of courts in the former absence of such a provision in the federal rules.

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subdivision (b)(4) a holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4) a provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Under subdivision (b)(4) b, the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum.

In ordering discovery under (b)(4) a 2, the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case.

(Note: The General Assembly deleted from the drafting committee's text a proposed provision identical to Federal Rule 26(b)(4)(B) expressly providing for discovery in very limited circumstances of experts retained in anticipation of litigation or in preparation for trial, but who are not expected to be called as witnesses. Failure to adopt this provision would not appear to foreclose such discovery on a proper showing under Rule 26(b)(3) or Rule 34.)

*Section (c) — protective orders.* — The provisions of existing [former] Rule 30(b) are transferred to this section (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.

The section contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. In addition, the court may require the payment of expenses incurred in relation to the motion.

*Section (d) — sequence and priority.* — This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case. North Carolina has not suffered from the problems presented by rules of priority of discovery existing in some other jurisdictions under the original federal rules. This rule will insure that we do not develop any such problems. The last sentence allows discovery to continue to the time of trial so long as it does not result in a delay of trial or of any other proceeding before the court.

*Section (e) — supplementation of responses.* — The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is.

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. Others have imposed the burden by decision. On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated.

Section (e) provides that a party is not under a continuing burden except as expressly provided. An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

**Editor's Note. —**

The 1971 amendment added to section (b) a paragraph relating to insurance agreements, similar to present subdivision (2) of section (b).

The 1975 amendment rewrote this rule.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

Some of the cases cited in the following annotation were decided under section (b) of this rule and Rule 30 as they stood before the 1975 amendment.

For comment, "Discoverability of Liability Insurance Policy Limits in North Carolina," see 7 Wake Forest L. Rev. 575 (1971).

**Where an order was entered allowing plaintiff to examine defendants pursuant to former procedure** for the purpose of securing information to file a complaint, plaintiff had a vested right to conduct such examination and did not need to move for an adverse examination under either this rule or Rule 27(b) when the Rules of Civil Procedure were subsequently enacted. Williams v. Blount, 14 N.C. App. 139, 187 S.E.2d 464 (1972).

**Section (b) authorizes pretrial discovery of information concerning automobile liability insurance** carried by a defendant where the only issues raised by the pleadings relate to negligence, contributory negligence and damage. Marks v. Thompson, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

**It is not unconstitutional** on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or impairs the right to contract. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Enforced discovery as authorized by the provisions of this rule is not an unwarranted invasion of defendant's privacy. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**The 1971 amendment to section (b) is a valid exercise of legislative authority.** Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

The 1971 amendment to section (b) of this rule confers upon a party the legal right to obtain discovery of the existence and contents of insurance agreements referred to therein. When a party elects to exercise this legal right, the discretionary authority conferred upon the judge by Rule 30(b) and (d) relates only to the time, place and circumstances of such discovery. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**And was Adopted for Same Reasons as 1970 Amendment to Federal Rule 26(b).** — Since the wording of the 1971 amendment of this rule concerning insurance agreements and that of the 1970 amendment to Federal Rule 26(b) are identical, the only reasonable inference is that they were adopted for the same reasons and were intended to accomplish the same result. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**Purpose of 1971 Amendment.** — The promotion of settlements is not the primary purpose of the 1971 amendment to section (b). Rather, its primary purpose is to enable both plaintiff and defendant to have equal information concerning all facts necessary to enable each to make a fair evaluation of his position incident to settlement negotiations. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**The test of relevancy under this rule is not the stringent test required at trial.** Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**The provision of section (b) that "it is not ground for objection that the testimony will be inadmissible** at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" refers only to testimony that will or might be inadmissible at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

**Materials Prepared in Anticipation of Litigation Protected.** — The protection under section (b)(3) is allowed not only materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Any materials prepared in anticipation for any litigation by the party from whom discovery is sought are protected under section (b)(3). Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Scope of Attorney-Client Privilege.** — Protection of the attorney-client privilege is absolute under this rule and the privilege under the rule is identical in scope to the traditional privilege. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Scope of "Work Product" Exception.** — Although not a privilege, the "work product," or trial preparation exception is a "qualified immunity" and extends to all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer or agent." Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Materials prepared in the ordinary course of business are not protected** under section (b)(3), nor does the protection extend to facts known by any party. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Rule Does Not Affect Privacy Surrounding Confidential Relationships.** — The General Assembly, in enacting the Rules of Civil Procedure, did not contemplate that Rule 33 and section (b) of this rule would enable the husband and the wife in actions between them to require the other to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage; the General Assembly did not intend in such manner to remove the cloak of privacy surrounding the confidential relationships of husband and wife. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Sections 8-56 and 50-10 are distinguishable from section (b) of this rule in that they relate to the disqualification of husband or wife as a witness with reference to specific matters, not to the admissibility or inadmissibility of the testimony of a qualified witness. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

**Authority of Judge When Party Exercises Right to Obtain Discovery of Insurance Agreement.** — When a party elects to exercise the legal right to obtain discovery of the existence and contents of insurance agreements under section (b), the discretionary authority conferred upon the judge relates only to the time, place and circumstances of such discovery. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**Customer list is not a trade secret.** Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975).

**Confidential Commercial Information.** — The courts under this rule should be careful in the interests of justice to prevent disclosure of confidential commercial information to avoid annoyance, embarrassment or oppression, particularly where the action is between competitors. Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 679 (1975).

**The trial judge's order under section (c) is discretionary** and is reviewable only for abuse of that discretion. Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

**Applied** in Continental Ins. Co. v. Foard, 9 N.C. App. 630, 177 S.E.2d 431 (1970); Harris v. Parker, 17 N.C. App. 606, 195 S.E.2d 121 (1973); Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974); Peterson v. Johnson, 28 N.C. App. 527, 221 S.E.2d 920 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

**Cited** in In re Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972); Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973); Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d 307 (1974); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

## Rule 27. Depositions before action or pending appeal.

(a) *Before action. —*

(1) Petition. — A person who desires to perpetuate his own testimony or that of another person regarding any matter may file a verified petition in the appropriate court in a county where any expected adverse party resides. The petition shall be entitled in the name of the petitioner and shall show: (i) that the petitioner expects that he, or his personal representative, heirs, legatees or devisees, will be a party to an action cognizable in any court, but that he is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and his reasons for desiring to perpetuate it, (iii) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (iv) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. — The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing (or within such time as the court may direct) the notice shall be served in the manner provided in Rule 4(j)(1) or (2) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(j)(1) or (2), an attorney who shall represent them, in case they are not otherwise represented. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. — If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. — If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this State in accordance with the provisions of Rule 32(a), or in any other court under whose rules it is admissible.

(b) *Pending appeal.* — If an appeal has been taken from the determination of any court or if petition for review or certiorari has been served and filed, or before the taking of an appeal or the filing of a petition for review or certiorari if the time therefor has not expired, the court in which the determination was made may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the trial court. In such case the party who desires to perpetuate the testimony may make a motion in the trial court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the trial court. The motion shall show (i) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (ii) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the trial court.

(c) *Perpetuation by action.* — This rule does not limit the power of a court to entertain an action to perpetuate testimony. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — This amendment deletes present Rule 27(b) which provided for depositions before action to obtain information to prepare a complaint. This provision and its predecessor generated about one half of all the appeals from orders relating to discovery in the North Carolina courts, most of them determined adversely to the party who initiated the procedure. Whatever may have been the justification for this procedure under the former code pleading practice in North Carolina, the adoption of the liberalized pleading requirements of Rule 8 would appear to have eliminated the necessity for retaining it.

The former sections (c) and (d) are redesignated as sections (b) and (c) respectively.

**Editor's Note.** — The 1975 amendment, in section (a), inserted "appropriate" near the end of the first sentence of subsection (1), substituted "reasons for desiring to perpetuate it" for "interest therein" in clause (ii) of the second sentence of subsection (1), added "in case they are not otherwise represented" at the end of the next-to-last sentence of subsection (2), and substituted "questions" for "interrogatories" at the end of the first sentence of section (3) and "Rule 32(a), or in any other court under whose rules it is admissible" for "Rule 26(d)" at the end of subsection (4). The amendment eliminated former section (b), relating to depositions before action for obtaining information to prepare a complaint, and redesignated former sections (c) and (d) as (b) and (c). In present section (b), the amendment inserted "or certiorari," "served and" and "for review or certiorari" in the first sentence and inserted "trial" preceding "court" near the end of the first and last sentences and in two places in the second sentence. The amendment also made minor changes in form and wording throughout this rule.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Construction of Former Section (b).** — For cases construing former section (b) of this rule, which was eliminated by the 1975 amendment, see In re Lewis, 11 N.C. App. 541, 181 S.E.2d 806, cert. denied, 279 N.C. 394, 183 S.E.2d 242 (1971); Williams v. Blount, 14 N.C. App. 139, 187 S.E.2d 464 (1972).

**Cited** in In re Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972).

**Rule 28. Persons before whom depositions may be taken.**

(a) *Within the United States.* — Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *In foreign countries.* — In a foreign country, depositions may be taken (i) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (ii) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (iii) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* — No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action unless the parties agree otherwise by stipulation as provided in Rule 29.

(d) *Depositions to be used outside this State.* —

(1) A person desiring to take depositions in this State to be used in proceedings pending in the courts of any other state or country may present to a judge of the superior or district court a commission, order, notice, consent, or other authority under which the deposition is to be taken, whereupon it shall be the duty of the judge to issue the necessary subpoenas pursuant to Rule 45. Orders of the character provided in Rules 30(b), 30(d), and 45(b) may be made upon proper application therefor by the person to whom such subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon him pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(2) The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior court. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — This section is amended slightly to conform to the federal rule, but its substance remains unchanged.

**Editor's Note.** — The 1975 amendment deleted "(i)" following "shall be taken" and "(ii)" following "examination is held, or" in the first sentence of section (a), substituted "a person" for "such person" near the end of that sentence, added the second sentence of section (a), rewrote section (b) and substituted "agree otherwise" for "otherwise agree" near the end of section (c).

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Applied** in Brown v. Neal, 283 N.C. 604, 197 S.E.2d 505 (1973).

### Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation (i) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (ii) modify the procedures provided by these rules for other methods of discovery. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order.

**Editor's Note.** — The 1975 amendment rewrote this rule.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

### Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45, provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to subsection (b)(1) of this rule. The deposition of a person confined in prison or of a patient receiving in-patient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination; general requirements; place of examination; special notice; nonstenographic recording; production of documents and things; deposition of organization.* —

(1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served

reside within the State. Depositions of parties, officers, directors or managing agents of parties or of other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may be taken only at the following places:

A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the State may be required to attend for such examination only in the county wherein he resides or within 50 miles of the place of service except that a judge, as defined by subdivision (h) of this rule, may, upon motion showing good cause, require that a party who selected the county where the action is pending as the forum for the action or an officer, director or managing agent of such a party, or a person designated pursuant to subsection (b)(6) hereof to testify on behalf of such a party present himself for the taking of his deposition in the county where the action is pending. The judge upon granting the motion may make any other orders allowed by Rule 26(c) with respect thereto, including orders with respect to the expenses of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (i) states that the person to be examined is about to go out of the county where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) Testimony at a deposition may be taken without order of court by methods other than stenographic means, including videotape. If the testimony is to be taken by other than stenographic means, the notice shall state the method by which it shall be taken and upon request of any party five days prior to the taking of the deposition, the deposing party shall provide for the transcribing of the testimony taken by videotape and the filing of the transcript of such testimony with the clerk in the manner provided in subsection (f)(1) of this rule.

(5) A party deponent, deponents who are officers, directors or managing agents of parties and other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may not be served with a subpoena duces tecum, but the notice to a party for the deposition of such a deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34, except as to time for response, shall apply to the request. When a notice to take such a deposition is accompanied by a request made in compliance with Rule 34 the notice and the request must be served at least 15 days earlier than would otherwise be required by Rule 30(b)(1), and any objections to such a request must be served at least seven days prior to the taking of the deposition.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. It shall not be necessary to serve a subpoena on an organization which is a party, but the notice, served on a party without an accompanying subpoena shall clearly advise such of its duty to make the required designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) *Examination and cross-examination; record of examination; oath; objections.* — Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The person before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the deponent. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken. Subject to any limitations imposed by orders entered pursuant to Rule 26(c) or 30(d), evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party who served the notice of taking the deposition, and he shall transmit them to the person before whom the deposition is to be taken who shall open them at the deposition, propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order the person before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to deponent; changes; signing.* — When the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by him, unless such examination and reading are waived by the deponent and by the parties. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the person before whom the deposition was taken with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission to him, the person before whom the deposition was taken shall sign the original thereof or, if the deponent refuses to return the original, a copy thereof and state on the record the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing by officer; exhibits; copies; notice of filing.* —

(1) The officer shall certify on the deposition that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the deponent shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (i) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials requests their return, the person before whom the deposition is taken shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The clerk shall give prompt notice of the filing of a deposition to all parties.

(g) *Failure to attend or to serve subpoena; expenses.* —

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) *Judge; definition.* —

(1) In respect to actions in the superior court, a judge of the court in which the action is pending shall, for the purposes of this rule, and Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be either a resident judge of the judicial district or a judge regularly presiding over the courts of the district or any special superior court judge holding court within the judicial district or residing therein.

(2) In respect to actions in the district court, a judge of the court in which the action is pending shall, for the purposes of this rule, Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be the chief district judge or any judge designated by him pursuant to G.S. 7A-192.

(3) In respect to actions in either the superior court or the district court, a judge of the court in the county where the deposition is being taken shall, for the purposes of this rule, be either a resident judge of the judicial district or a judge regularly presiding over the courts, or any special superior court judge holding court within the judicial district or residing therein, or the chief judge of the district court or any judge designated by him pursuant to G.S. 7A-192. (1967, c. 954, s. 1; 1973, c. 828, s. 1; c. 1126, ss. 1, 2; 1975, c. 762, s. 2; 1977, c. 769.)

**Comment — 1975 Amendment.** — *Section (a).* This section contains the provisions of existing [former] Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing [former] Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This section is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 30 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 30-day period runs from the service of summons and complaint on any defendant, rather than the commencement of the action. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from [former] 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is to protect a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. The new procedure is consistent in principle with the provisions of Rules 33, 34 and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subsection (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The North Carolina modification of the former federal rule, requiring leave of court to depose mental patients as well as prisoners, is retained in substance.

The provision obviating the necessity of serving a subpoena on a deponent who is a party or an officer, director or managing agent of a party where the party has been served with notice of the deposition incorporates by rule the result reached by decision in most federal courts.

*Section (b).* — Existing [former] Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing former Rule 30(a) relating to the notice of taking deposition has been transferred to this section. Because new material has been added, subsection numbers have been inserted.

Subsection (b)(1). — If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively. The former North Carolina requirement, designating the length of notice required, is retained in preference to the standard of reasonable notice contained in the federal rules. The provision with respect to the place of deposition is removed in a modified form to this subsection from Rule 45(d)(2), where it referred only to deponents testifying under subpoena, and not to party deponents testifying pursuant to notice only.

Subsection (b)(2). — This subsection is discussed in the note to section (a), to which it relates.

Subsection (b)(3). — This provision is new, although the power of the Court to alter the time of a deposition has probably always existed.

Subsection (b)(4). — In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means — e.g., by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

Subsection (b)(5). — A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of subpoena duces tecum as authorized by Rule 45, but some federal courts held under the former federal rule that documents could be secured from a party only under former Rule 34, which required notice, hearing and an order finding good cause for production. With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone. The provisions as to the timing of such a request eliminates an ambiguity present in the new federal rule and insures that the party giving notice of the taking of a deposition will know in advance of the deposition what documents or things the deponent declines to produce. This will allow the deposing party an opportunity to seek an order to compel production under Rule 37(a) prior to the deposition if he is so advised and will serve to minimize the risk that a deposition will be adjourned because of the previously undisclosed refusal of the deponent to produce requested documents or things.

Subsection (b)(6). — A new provision is added, whereby a party may name a corporation, partnership, association or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation — for example, in a personal injury case — can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subsection have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subsection.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

The rule is so phrased that notice to parties, including a party deponent, and a subpoena to a nonparty organization are required to bring the rule into play.

The wording of this subsection is slightly altered from that of the federal rule to eliminate an ambiguity as to whether the subpoena must be issued to a party.

*Section (c).* — A new sentence is inserted at the beginning, representing the transfer of existing [former] Rule 26(c) to this section. Another addition conforms to the new provision in subsection (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

*Section (d).* — The assessment of expenses incurred in relation to motions made under this section (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this section.

*Section (e).* — The provision relating to the refusal of a deponent to sign his deposition is tightened through insertion of a 30-day time period and a provision allowing use of the deposition upon the refusal or failure of the deponent to sign and return it within the required time.

Subsection (f)(1). — A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to a subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a deponent may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured.

The former requirement of North Carolina Rule 26(f)(1) that the original and one copy be filed with the clerk is abandoned. In practice it proved to have little utility and was generally waived or ignored.

Subsection (f)(3). — This provision clarifies the conflict between former Rule 30(f)(3) which required the party to give the notice, and 32(e) which required the clerk to do so. It also eliminates the former requirement that the party taking the deposition furnish a copy to all other parties. Whatever the reason for the former requirement may have been, in practice it has penalized the party with limited means who must utilize depositions to make out his claim or defense.

*Section (g).* — This provision contained only minor changes in phraseology not affecting the substance of the rule.

**Editor's Note.** —

The first 1973 amendment, effective Jan. 1, 1975, added to section (a) of this rule as it stood before the 1975 amendment a provision authorizing a judge to shorten the time for giving notice of examination.

The second 1973 amendment made changes in sections (c) and (f) as they stood before the 1975 amendment.

The 1975 amendment rewrote this rule.

The 1977 amendment, effective July 1, 1977, rewrote subsection (b)(4).

Session Laws 1973, c. 828, s. 2, provides: "This act shall be in full force and effect on and after January 1, 1975, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date."

Session Laws 1973, c. 1126, s. 3, provides: "This act shall not apply to pending litigation."

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**The right to take the deposition granted by section (a) is unqualified** except for the provision of Rule 26(c) authorizing the trial court to issue "protective orders." Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

**Applied** in Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

**Cited** in Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d 307 (1974).

## Rule 31. Depositions upon written questions.

(a) *Serving questions; notice.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45 provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to this rule. Such a deposition shall be taken in the county where the witness resides or is employed or transacts his business in person unless the witness agrees that it may be taken elsewhere. The deposition of a person confined in prison or of a patient receiving in-patient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (i) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (ii) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Person to take responses and prepare record.* — A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the person designated in the notice to take the deposition, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) *Notice of filing.* — When the deposition is filed the clerk shall promptly give notice thereof to all parties. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

*Section (a).* — A new paragraph is inserted at the beginning of this section to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised section permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organizations is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits under the former federal rule showed them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

The provision obviating the necessity of service of subpoena on a party or an officer, director or managing agent of a party conforms to revised Rule 30(a) and federal case law in the absence of a similar provision in the federal rules.

The North Carolina modification of the former federal rule, requiring leave of court to depose mental patients as well as prisoners, is retained in substance.

*Section (c).* — This section is amended to conform to the change in Rule 30(f)(3).

*Former Section (d).* — Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, section (d) is eliminated as unnecessary.

**Editor's Note.** — The 1975 amendment rewrote this rule.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Use of Deposition in Civil Case Is Limited.** — Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

**Admissibility Where Deponent Not a Party.** — Where the record contained no indication by evidence or stipulation as to the whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in Rule 26(d)(3) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

**Applied** in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**Cited** in Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975).

## Rule 32. Use of depositions in court proceedings.

(a) *Use of depositions.* — At the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a person called as a witness may also be used as substantive evidence by any party adverse to the party who called the deponent as a witness and it may be used by the party calling deponent as a witness as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.

(3) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used; or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4).

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* — Subject to the provisions of Rules 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Effect of taking or using depositions.* — A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Effect of errors and irregularities in depositions.* —

(1) As to Notice. — All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Person before Whom Taken. — Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. —

a. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

b. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

c. Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. — Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the person taking the deposition under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 1977, c. 984.)

**Comment — 1975 Amendment.** — As part of the rearrangement of the discovery rules, existing [former] sections (d) and (e) of Rule 26 are transferred to Rule 32 as new sections (a) and (c). The provisions of Rule 32 are retained as section (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial by-product of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. The language of present [former] Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear.

The provisions of former Rule 26(d)(2) a and b, governing use of a deposition where the deponent testifies at trial, are preserved in Rule 32(a)(1) and (2) with the added provision that any party may use a deposition to contradict or impeach a witness who testifies at trial.

Note present [former] Rule 26(e), transferred to Rule 32(b).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

The somewhat unwieldy provisions of former Rule 32(e) relating to the mechanics of handling objections to all or part of a deposition are abandoned in favor of present Rule 32(b).

The absence of specific provisions relating to the time when objections of various kinds must be made has necessitated the entry of a stipulation on the subject in every carefully taken deposition. Rules 32(d)(3) a and b incorporate in the rules provisions that are almost universally stipulated by the parties in the absence of a rule.

**Editor's Note.** — The 1975 amendment rewrote this rule.

The 1977 amendment, effective July 1, 1977, in subsection (a)(4), deleted the clause designations and added "or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4)" to the end.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

The cases cited in the following annotation were decided under former sections (d) and (e) of Rule 26 as it stood before the 1975 amendment.

**Use of Depositions in Civil Cases Is Limited.** — Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

**Admissibility for Purpose of Corroboration.** — This rule does not provide that depositions are admissible for the purpose of corroboration of testimony given by deponent at trial. Miller v. Kennedy, 22 N.C. App. 163, 205 S.E.2d 741, cert. denied, 285 N.C. 661, 207 S.E.2d 755 (1974).

**Admissibility where Deponent Not a Party.** — Where the record contained no indication by evidence or stipulation as to the whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in former subsection (d)(3) of Rule 26 (similar to subsection (a)(4) of this rule) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

**Application of Subsection (a)(3) in Workmen's Compensation Hearing.** — In a workmen's compensation hearing, the admissibility of an adverse examination of defendant's president was governed by former subsection (d)(1) of Rule 26 (similar to subsection (a)(3) of this rule) and portions of the adverse examination offered by plaintiffs should have been received in evidence, notwithstanding defendant's president had testified in one of the hearings and resided within 75 miles of the hearing site. Gay v. Guaranteed Supply Co., 12 N.C. App. 149, 182 S.E.2d 664 (1971).

**Whether a deposition may be used at trial pursuant to section (a)(4) will depend upon the circumstances** at the time of the trial. Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

**Introduction in Evidence by Plaintiff of Adverse Examination of Defendant.** — The introduction in evidence by a plaintiff of the adverse examination of the defendant no longer makes the defendant a witness for the plaintiff. Plaintiff does not thereby represent the defendant as being worthy of belief as to each and every aspect of his testimony but may impeach him as well as contradict him. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

**The rule applicable to the testimony at trial of an adverse party under Rule 43(b) is equally applicable** to the adverse party's testimony under adverse examination. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

In marking the distinction between the introduction and use of the testimony of an adverse party, whether obtained by adverse examination prior to trial or at trial, and the introduction and use of the testimony of a witness other than a party, whether obtained by deposition or at trial, both this rule and Rule 43(b) recognize that the self-interest of the adverse party bears upon the credibility of that portion of his testimony which tends to exculpate him and to place blame upon another. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

**Rule 33. Interrogatories to parties.**

(a) *Availability; procedures for use.* — Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) *Scope; use at trial.* — Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) *Option to produce business records.* — Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. (1967, c. 954, s. 1; 1971, c. 1156, s. 4.5; 1975, c. 99; c. 762, s. 2.)

**Comment — 1975 Amendment.** — *Section (a).* — The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is generally agreement that interrogatories have spawned a greater percentage of objections and motions than any other discovery device.

The procedures provided in former Rule 33 seemed calculated to encourage objections and court motions. The time period allowed for objecting to interrogatories, 10 days, was too short. The time pressures tended to encourage objections as a means of gaining time to answer. The time for objections was even shorter than for answers, and the party ran the risk that if he failed to object in time he may have waived his objections. It often seemed easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Rule 33 imposed no sanction of expenses on a party whose objections were clearly unjustified. Rule 33 assured that the objections led directly to court, through its requirement that they be served with a notice of hearing. Although this procedure did not preclude an out-of-court resolution of the dispute, the procedure tended to discourage informal negotiations. If answers were served and they were thought inadequate, the interrogating party could move under Rule 37(a) for an order compelling adequate answers. There was no assurance that the hearing on objections and that on inadequate answers would be heard together.

The amendment improves the procedure of Rule 33 in the following respects:

(1) The time allowed for response applies to both answers and objections, but a defendant need not respond in less than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or all of the interrogatories are objectionable may choose to seek a protective order under new Rule 26(c) or may serve objections under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any failure to respond is easily noted.

(2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement — that defendant have time to obtain counsel before a response must be made — is adequately fulfilled by the requirement that interrogatories be served upon a party with or after service of the summons and complaint upon him.

(3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. If the discovering party asserts that an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation.

A change is made in section (a) which is not related to the sequence of procedures. The restriction to "adverse" parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings — even though the parties may have conflicting interests. The resulting distinctions have often been highly technical. Eliminating the requirement of "adverse" parties from Rule 33 brings it into line with all other discovery rules.

A second change in section (a) is the addition of the term "governmental agency" to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

*Section (b).* — There are numerous and conflicting federal decisions on the question whether and to what extent interrogatories are limited to matters "of fact," or may elicit opinions, contentions, and legal conclusions.

Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. On the other hand, under the new language interrogatories may not extend to issues of "pure law," i.e., legal issues unrelated to the facts of the case.

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which Rule 33 presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination.

Certain provisions are deleted from section (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The language of the section is thus simplified without any change of substance.

*Section (c).* — This is a new section relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The section gives the party an option to make the records available and place the burden of research on the party who seeks the information. This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee, and alleviates a problem which in the past has troubled federal courts. The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this section does not on that account lose the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the section, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

*Disclosure of trial witnesses.* — Prior to the 1970 revision the federal cases were in conflict as to whether a party could be required at a proper time, in response to an interrogatory or by other discovery devices, to state the names and addresses of witnesses then known, and whom he proposed to call at trial. Probably the weight of reported authority was that a party is not required so to do. But at least the judge at pretrial under Rule 16 may require disclosure in the exercise of a sound discretion in light of all the circumstances.

And the 1970 revision provides that "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Rule 26(b)(4) a 1, supra.

*Obtaining copies of documents, etc., by requesting a party to attach them to his answers to interrogatories.* — Formerly Rule 34 required a motion showing good cause as a prerequisite to obtaining discovery and production of documents and things for inspection, copying or photographing. Accordingly, most federal authorities held that interrogatories to a party requesting copies of documents were not proper and that copies of statements or witnesses and other documents could be obtained from a party only under Rule 34 (or Rules 26 and 45) upon a showing of good cause. The present revision eliminates the good-cause requirement in Rule 34; but section (b) of that rule sets out the procedure that should be followed in obtaining inspection, etc. Rule 34 does not, however, deal with discovery of trial preparation materials. That matter is now dealt with by Rule 26(b)(3), (4), supra. Those provisions allow a party or a witness to obtain a copy of his own written statement as of right. And a party is entitled, as of right, to obtain from any other party the names of expert witnesses whom he expects to call at trial, and a statement of the substance of the facts and opinions to which the expert is expected to testify. Rule 26(b)(4) a 1, supra. As to other trial preparation materials a party must make the showing spelled out in Rule 26(b)(3), supra. This requirement, accordingly, should not be circumvented by an improper use of Rule 33 or Rule 34.

Rule 30(b)(5) does, however, provide that "The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition."

**Editor's Note.** — The 1971 amendment changed the time for serving a copy of the answers on the party submitting the interrogatories from 15 to 30 days after service of the interrogatories.

The first 1975 amendment, effective July 1, 1975, changed the time for serving answers or objections to interrogatories from 10 to 30 days after service of the interrogatories.

The second 1975 amendment rewrote this rule to read as set out above.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Discretion of Trial Court.** — The trial court acts within its discretion in making and refusing discovery orders. George W. Shipp Travel Agency, Inc. v. Dunn, 20 N.C. App. 706, 202 S.E.2d 812, cert. denied, 285 N.C. 237, 204 S.E.2d 23 (1974).

**Husband or Wife Is Incompetent to Answer Interrogatories.** — The provisions of §§ 8-56 and 50-10 which render a husband or wife an incompetent witness apply to answers to interrogatories as well as to testimony at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

The General Assembly, in enacting the Rules of Civil Procedure, did not contemplate that this rule and Rule 26(b) would enable the husband and the wife in actions between them to require the other to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage; the General Assembly did not intend in such manner to remove the cloak of privacy surrounding the confidential relationships of husband and wife. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

**Failure to Object to Interrogatories Is Usually Waiver.** — Ordinarily, in the absence of an extension of time, failure to object to interrogatories within the time fixed by the rule is a waiver of any objection. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478 (1973).

Where plaintiff was properly served with interrogatories but refused to answer them without good cause, did not serve on defendant objections to any of the interrogatories or ask for an extension of time to answer, the trial court properly dismissed plaintiff's action. Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d

307, cert. denied, 285 N.C. 233, 204 S.E.2d 23 (1974).

**But this principle must yield to the privilege against self-incrimination** guaranteed by the Fifth Amendment to the federal Constitution. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

When time has lapsed the defendant will be deemed to have waived its right to object to the interrogatories absent some overriding constitutional privilege such as self-incrimination. Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 679 (1975).

**Applied** in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972); Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972); Harris v. Parker, 17 N.C. App. 606, 195 S.E.2d 121 (1973).

**Cited** in Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

## Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* — Any party may serve on any other party a request (i) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (ii) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* — The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* — This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. (1967, c. 954, s. 1; 1969, c. 895, s. 8; 1973, c. 923, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause for production, which was formerly superimposed on the provisions regulating the permissible scope of discovery; (2) to have the rule operate without the necessity of the court's participation; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

*Section (a).* — Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good-cause requirement was originally inserted in federal Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. The overwhelming proportion of the cases in which the formula of good cause has been applied to require a specific showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially rather than by court order is to a large extent a reflection of existing practice.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing.

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

*Section (b).* — The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

*Section (c).* — Rule 34 as revised continues to apply only to parties. Comments from the bar to the drafters of the federal rule made clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some federal courts had dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this section makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

*Relation to other rules.* — Rule 34 does not deal with trial preparation materials, since discovery as to those materials is specially dealt with by Rule 26(b)(3), (4). Accordingly, those provisions should not be circumvented by an improper use of Rule 33 or 34.

A request made in compliance with Rule 34 may accompany the notice to a party deponent to take his oral deposition. Rule 30(b)(5).

**Editor's Note.** —

The 1973 amendment rewrote the former introductory paragraph.

The 1975 amendment rewrote this rule.

Session Laws 1973, c. 923, s. 2, provides: "This act shall be in full force and effect on and after Jan. 1, 1975, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date."

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Requirement of Court Order Based Upon Motion and Good Cause Eliminated.** — The new procedure for obtaining production and inspection of documents has eliminated the requirement of a court order based upon motion and good cause. This new rule simply requires serving the request for production upon the other party. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Good Cause under Former Rule.** — As to what constituted good cause under this rule as it stood before the 1975 amendment, see Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

**Prerequisites of Production.** — This rule requires that as a prerequisite of production, documents must be (1) "designated," (2) "within the scope" of Rule 26(b), and (3) in the "possession, custody or control" of a party from whom they are sought. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**The party seeking production must show that these prerequisites are satisfied.** Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**"Designation" by Categories May Be Sufficient.** — "Designation" as used in this rule does not necessarily mean that documents must be separately described. Designation by categories may be sufficient depending upon the categories utilized. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Applied** in Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971).

**Cited** in Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975); Lundy Packing Co. v. Amalgamated Meat Cutters, AFL-CIO, 31 N.C. App. 595, 230 S.E.2d 181 (1976).

## Rule 35. Physical and mental examination of persons.

(a) *Order for examination.* — When the mental or physical condition (including the blood group) of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30(h) may order the party to submit to a physical or mental examination by a physician or to produce for examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of examining physician.* —

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — North Carolina adopted this provision in this form in advance of its adoption as a part of the federal rules. The provision bringing an agent of a party within the scope of the rule is the only present change aside from the addition of subsection (b)(3).

*Subsection (b)(3).* — This new subsection removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement and sometimes before the party examined has an attorney. The federal courts have uniformly ordered that reports be supplied and it appears best to fill the technical gap in the present rule.

The subsection also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b) — such as Rules 34 or 26(b) (3) or (4) — discovery should not depend upon whether the person examined demands a copy of the report.

**Editor's Note.** — The 1975 amendment rewrote section (a) and subsection (1) of section (b), inserted "mental or physical" near the end of subsection (2) of section (b) and added subsection (3) of that section.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Cited** in Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656 (1976); Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

## Rule 36. Requests for admission; effect of admission.

(a) *Request for admission.* — A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) *Effect of admission.* — Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified.

*Section (a).* — As revised, the section provides that a request may be made to admit any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the federal court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule.

Not only is it difficult as a practical matter to separate "fact" from "opinion," but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to requests for admission as to matters which that party regards as "in dispute." The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests.

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion.

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules sets forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 20 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule — for example, a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held.

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. The rule as revised conforms to the latter practice.

*Section (b).* — The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony. At least in some jurisdictions a party may rebut his own testimony, and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a

Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

**Editor's Note.** — The 1975 amendment rewrote this rule.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Cited** in Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972); Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

## Rule 37. Failure to make discovery; sanctions.

(a) *Motion for order compelling discovery.* — A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. — An application for an order to a party or a deponent who is not a party may be made to a judge of the court in which the action is pending, or, on matters relating to a deposition where the deposition is being taken in this State, to a judge of the court in the county where the deposition is being taken, as defined by Rule 30(h).

(2) Motion. — If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question shall complete the examination on all other matters before he adjourns the examination in order to apply for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. — For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. — If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.* —

(1) Sanctions by Court in County Where Deposition Is Taken. — If a deponent fails to be sworn or to answer a question after being directed to do so by a judge of the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. — If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

e. Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in subdivisions a, b, and c of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* — If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* — If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (i) to appear before the person who is to take his deposition, after being served with a proper notice, or (ii) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c). (1967, c. 954, s. 1; 1973, c. 827, s. 1; 1975, c. 762, s. 2.)

**Comment — 1975 Amendment.** — Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience in the federal courts brought to light a number of defects in the language of the rule as well as instances in which it was not serving the purposes for which it was designed. In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, federal courts imported into "refusal" a requirement of "willfullness." In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the United States Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that willfulness was relevant only to the selection of sanctions, if any, to be imposed. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate confusion.

*Section (a).* — Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subsection (a)(1). — This is a new provision making clear to which court a party may apply for an order compelling discovery. In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision spells out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subsection (a)(2). — This subsection contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or in part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subsection (a)(3). — This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subsection (a), a failure to answer. The federal courts have consistently held that they have the power to compel adequate answers. This power of the court is recognized and incorporated into the rule.

Subsection (a)(4). — This subsection adds provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. The prior North Carolina rule had no such provision. The provision requires that expenses be awarded unless the conduct of the losing party or person is found to have been "substantially justified." This language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The proposed provision provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust — as where the prevailing party also acted unjustifiably. The amendment does not significantly limit the discretion of the court, but rather presses the court to address itself to abusive practices.

*Section (b).* — This section deals with sanctions for failure to comply with a court order.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery — e.g., Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

Paragraph e provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith."

Subsection (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, federal courts have nevertheless ordered them on occasion. The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in section (d) and is explained in the note to that section. The added reference to persons designated by a party under Rules 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

*Section (c).* — Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial, or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the federal courts. The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

*Section (d).* — The scope of section (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

The permissible sanctions are broadened to include such orders "as are just." Although former federal rule 37(d) in terms provided for only three sanctions, all rather severe, the federal courts had interpreted it as permitting softer sanctions than those which it set forth. The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "willful." The concept of "willful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to willfullness. In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of federal practice, or by his preoccupation with another aspect of the case, dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Willfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in Societe Internationale v. Rogers, 357 U.S. 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. Prior to the adoption of this rule, federal cases were divided on whether a protective order must be sought. The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process.

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good-faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions.

**Editor's Note.** — The 1973 amendment rewrote section (c).

The 1975 amendment rewrote this rule.

Session Laws 1973, c. 827, s. 2, provides: "This act shall be in full force and effect on and after Jan. 1, 1975, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date."

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

**Purpose of Section (d).** — The provision in section (d) for a mandatory allowance of expenses against a party which fails to respond to a discovery request, unless other sanctions are imposed under this rule or unless the failure "was substantially justified or . . . other circumstances make an award of expenses unjust," is designed to discourage dilatory practices and frivolous refusals to comply with discovery procedures. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**When Section (d) Not Applicable.** — Section (d) does not come into operation if the responding party meets the requirements of Rule 33 as to interrogatories and those of Rule 34 as to requests for production. Thus, if a party files answers or objections to interrogatories, or serves a written response to a request for inspection, no sanctions under section (d) may be obtained and the proper procedure for the party seeking discovery is to obtain an order compelling discovery under section (a). Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**The failure of some answering defendants to answer** interrogatories did not entitle the plaintiffs to a judgment based on their own conclusions and contentions. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

**Plaintiff's Action Properly Dismissed for Failure to Answer Interrogatories.** — Where plaintiff was properly served with interrogatories but refused to answer them without good cause and did not serve on defendant objections to any of the interrogatories or ask for an extension of time to answer, the trial court properly dismissed plaintiff's action. Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d 307, cert. denied, 285 N.C. 233, 204 S.E.2d 23 (1974).

**Applied** in Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

**Cited** in Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977).

## ARTICLE 6.

## *Trials.*

### Rule 38. Jury trial of right.

(e) *Right granted.* — The right of trial by jury as to the issue of just compensation shall be granted to the parties involved in any condemnation proceeding brought by bodies politic, corporations or persons which possess the power of eminent domain. (1967, c. 954, s. 1; 1973, c. 149.)

**Editor's Note.** —

The 1973 amendment added section (e).

As the rest of the rule was not changed by the amendment, only section (e) is set out.

**Right to Demand Jury Trial.** — North Carolina Const., Art. I, § 25, guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

**A party may waive his right to jury trial** by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to section (b). Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

**But Trial Court May Grant Subsequent Motion under Rule 39(b).** — Even though a party has failed to demand a jury trial as prescribed by section (b), it is within the discretion of the trial judge to grant a subsequent motion for a jury trial under Rule 39(b). Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976).

The trial court has discretion to grant a jury trial under Rule 39(b) even though jury trial has been waived pursuant to section (b). Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976).

**Oral Request.** — Where the parties did not demand a jury trial in the manner provided by this rule, but all parties did orally request trial by jury, and the clerk noted the request in her order transferring the cause to the civil issue docket of the superior court, the purpose of this rule was accomplished. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**Issue of Fact Must Be Tried by Jury Unless Right Is Waived.** — The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Ten days from the date of the last pleading both parties are precluded from demanding a jury trial.** Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

**Where the pleadings in an action were closed prior to the effective date of the rules,** and juries had been empaneled to try the case on two previous occasions since that date, the trial court erred in determining that defendant had waived the right to a jury trial under this rule by failing to file a written request therefor. Fishel v. Grifton United Methodist Church, 13 N.C. App. 238, 185 S.E.2d 322 (1971).

**Transfer of Action without Notice Denied Defendant's Right to Jury Trial.** — Defendant was denied its constitutional right to a jury trial where the action was transferred from the superior court division to the district court division without notice to defendant, so that defendant made no demand for jury trial in the district court within the 10-day time period formerly allowed by § 7A-196 (this rule now applies and contains similar requirements), and the district court subsequently denied defendant's demand for a jury trial. Thermo-Industries v. Talton Constr. Co., 9 N.C. App. 55, 175 S.E.2d 370 (1970).

**Where Denial of Jury Trial Is Not Error.** — Where a demand for jury trial is not made in compliance with this rule and there is no controversy as to any of the facts and therefore no issue of fact to be determined by a jury, the denial of a jury trial is not error. Glover v. Spinks, 12 N.C. App. 380, 183 S.E.2d 262 (1971).

**Applied** in Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Rose & Day, Inc. v. Cleary, 14 N.C. App. 125, 187 S.E.2d 359 (1972); Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976).

**Cited** in Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Laws v. Laws, 22 N.C. App. 344, 206 S.E.2d 324 (1974).

## Rule 39. Trial by jury or by the court.

**The denial of respondent's belated demand for a jury trial is within the discretion of the judge.** Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

**Applied** in Rose & Day, Inc. v. Cleary, 14 N.C. App. 125, 187 S.E.2d 359 (1972); Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**Cited** in Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Laws v. Laws, 22 N.C. App. 344, 206 S.E.2d 324 (1974); Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976); Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976).

## Rule 40. Assignment of cases for trial; continuances.

**Editor's Note. —**

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Continuances are addressed to the sound discretion of trial judges** and may be granted only for good cause shown and as justice may require. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Wood v. Brown, 25 N.C. App. 241, 212 S.E.2d 690, cert. denied, 287 N.C. 469, 215 S.E.2d 626 (1975).

A motion for continuance is addressed to the sound discretion of the trial judge. State v. Courson, 27 N.C. App. 268, 218 S.E.2d 416, cert. denied, 288 N.C. 732, 220 S.E.2d 352 (1975).

Granting a motion for a continuance is within the discretion of the trial court. State v. Edwards, 27 N.C. App. 369, 219 S.E.2d 249 (1975).

This rule makes no attempt to enumerate the myriad circumstances which might be urged as grounds for a continuance, but leaves it to the judge to determine, in each case, whether "good cause" for a continuance has been shown. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

A motion to continue is addressed to the sound discretion of the trial judge, who should determine it as the rights of the parties require under the circumstances. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Discretion of the trial judge in ruling on a motion for a continuance is not unlimited, and must not be exercised absolutely, arbitrarily or capriciously, but only in accordance with fixed legal principles. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Since motions for continuance are generally addressed to the sound discretion of the trial court, a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**And ruling thereon is not reviewable in absence of manifest abuse of discretion.** Wood v. Brown, 25 N.C. App. 241, 212 S.E.2d 690, cert. denied, 287 N.C. 469, 215 S.E.2d 626 (1975); State v. Courson, 27 N.C. App. 268, 218 S.E.2d 416, cert. denied, 288 N.C. 732, 220 S.E.2d 352 (1975); State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975), cert. denied, 289 N.C. 301, 222 S.E.2d 701 (1976); State v. Edwards, 27 N.C. App. 369, 219 S.E.2d 249 (1975).

**Continuances are not favored.** Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**Withdrawal of Attorney. —** Respondents were prima facie entitled to a continuance where respondents' affidavit and statements in open court that their attorney had withdrawn from the case on the day of the trial without warning were uncontroverted by the record. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

An attorney's withdrawal on the eve of the trial of a civil case is not ipso facto grounds for a continuance. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

The decision whether to grant a continuance because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion, to be exercised after he has determined from the facts and circumstances of the particular case whether immediate trial or continuance will best serve the ends of justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**Factors to Be Considered. —** The chief consideration to be weighed in passing upon the application for a continuance is whether the grant or denial of a continuance will be in furtherance of substantial justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

In passing on a motion for continuance the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

In reaching its conclusion on a motion for a continuance the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

In ruling on a motion for a continuance the trial court may take into consideration facts within its judicial knowledge. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

The motion for a continuance should be granted where nothing in the record controverts a sufficient showing made by the moving party. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**Party seeking continuance has burden of showing sufficient grounds for it.** Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

**Presence of Attorney Required Elsewhere.** — Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

## Rule 41. Dismissal of actions.

(d) *Costs.* — A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action. (1967, c. 954, s. 1; 1969, c. 895, s. 10; 1977, c. 290.)

**Editor's Note.** —

The 1977 amendment, effective Jan. 1, 1978, in section (d), substituted the language beginning "shall make an order for the payment of such costs" for "shall dismiss the action" at the end of the second sentence and added the third sentence.

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Rule 4(e) and section (b) of this rule are not in conflict,** and both can be given effect. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

**Motion for Nonsuit Replaced by Motion for Dismissal.** — In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

In a civil action tried without a jury, the former motion for nonsuit has been replaced by the motion for dismissal. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

A motion for nonsuit is no longer proper in a civil action. In an action tried by the court without a jury, a defendant may move for a dismissal on the ground that upon the facts and the law plaintiff has shown no right to relief. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Since January 1, 1970, the former motion for involuntary nonsuit in nonjury trials has been replaced by the motion for dismissal authorized by sections (b) and (c). International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972).

A voluntary dismissal under the current Rules of Civil Procedure is substantially the same as a voluntary nonsuit under the former procedure. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

In nonjury trials, the former motion for nonsuit has been replaced by the motion for a dismissal. Schafran v. A & H Cleaners, Inc., 19 N.C. App. 365, 198 S.E.2d 734, cert. denied, 284 N.C. 255, 200 S.E.2d 655 (1973).

**Common-Law Rule Changed.** — This State has continued up until the present time to follow the common-law rule which permitted the plaintiff to take a nonsuit at any time before the verdict. But this rule of practice has been changed by the adoption of this rule, which provides that an action or any claim therein may be dismissed by the plaintiff without an order of court "by filing a notice of dismissal at any time before the plaintiff rests his case." Clemmons v. Life Ins. Co., 6 N.C. App. 708, 171 S.E.2d 87 (1969).

Under the new Rules of Civil Procedure a plaintiff can no longer take a voluntary nonsuit as a matter of right or secure a voluntary dismissal without prejudice after he has rested his case. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

This rule had the effect of changing former practice only to the extent that the plaintiff desiring to take a voluntary nonsuit, now a voluntary dismissal, must now act before he rests his case, whereas under former practice he could do so at any time before the verdict. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Effect of 1969 amendment of subsection (a)(1).** — See McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975).

**Subsection (a)(1), as first enacted, was patterned closely upon the cognate federal rule.** McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975), aff'd in part & rev'd in part, 289 N.C. 109, 221 S.E.2d 490 (1976).

**This rule permits one voluntary dismissal,** but the right must be exercised before a plaintiff rests his case. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Effect of Voluntary Dismissal Without Prejudice.** — Under this rule, a voluntary dismissal without prejudice allows a new action on the same claim to be instituted within one year. Webb v. Nolan, 361 F. Supp. 418 (M.D.N.C. 1972), aff'd, 484 F.2d 1049 (4th Cir. 1973), appeal dismissed, 415 U.S. 903, 94 S. Ct. 1397, 39 L. Ed. 2d 461 (1974).

**Mere vagueness or lack of detail is not ground for a motion to dismiss.** Such a deficiency should be attacked by a motion for a more definite statement. Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

**Plaintiff's voluntary dismissal of a prior action is a final termination of that action** and no valid order can be made thereafter in that cause. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

Under the former practice a judgment of voluntary nonsuit terminated the action and no suit was pending thereafter on which the court could make a valid order, and the same rule applies to an action in which a plaintiff takes a voluntary dismissal under section (a) (1) of this rule. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

A voluntary dismissal under section (a)(1) of this rule terminates the action and no suit is pending thereafter in which the court could make a valid order. Sutton v. Sutton, 18 N.C. App. 480, 197 S.E.2d 9 (1973); Caroon v. Eubank, 30 N.C. App. 244, 226 S.E.2d 691 (1976).

**First Voluntary Dismissal Not Adjudication on Merits.** — In an action instituted for temporary and permanent alimony, child custody and support and attorney fees, defendant was in no position to complain that the issues raised had been determined in a previous action instituted in which plaintiff had taken a voluntary dismissal since the first such dismissal was not an adjudication upon the merits. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

**The major thrust of section (a)(1) is to limit the time** within which a plaintiff has the absolute right to dismiss his action without prejudice, which period is now any time before he rests his case. Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 198 S.E.2d 741 (1973).

**Limitation Is Extension beyond General Statute of Limitations.** — A party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in this rule. But this rule shall not be used to limit the time to one year if the general statute of limitation has not expired. Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 198 S.E.2d 741 (1973).

When the General Assembly adopted the provisions of former § 1-25 into section (a)(1), it adopted also that body of case law interpreting the former section, the effect being that the provision of section (a)(1) is an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 198 S.E.2d 741 (1973).

**The purpose of section (a)(2)** is to permit a superior court judge in the exercise of his discretion to dismiss an action without prejudice if in his opinion an adverse judgment with prejudice would defeat justice. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

**Dismissal under Section (a)(2).** — Under section (a)(2), at the instance of the plaintiff, the court may permit a voluntary dismissal upon such terms and conditions as justice requires. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

The court may, at the instance of the petitioners, order a voluntary dismissal without prejudice upon such terms and conditions as justice requires. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

A dismissal without prejudice is permissible under section (a)(2) only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

A dismissal under section (a)(2) is granted or denied solely within the discretion of the trial judge and may be conditionally granted or granted upon such terms as justice requires. Lewis v. Piggott, 16 N.C. App. 395, 192 S.E.2d 128 (1972).

**Plaintiff cannot be made to choose which remedy he will pursue before he takes a voluntary dismissal.** Caroon v. Eubank, 30 N.C. App. 244, 226 S.E.2d 691 (1976).

**Plaintiff May Move for Voluntary Dismissal after Defendant Moves for Directed Verdict.** — Prior to granting the motion of the answering defendants for a directed verdict against plaintiffs and the entry of a judgment adverse to plaintiffs, plaintiffs are entitled to move, if so advised, that an order be entered providing for a voluntary dismissal upon such terms and conditions as justice requires. Whether such order should be entered will be addressed to the discretion of the superior court judge. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under section (a)(2). The court may permit a voluntary dismissal upon such terms and conditions as justice requires. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When a defendant's motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under section (a)(2) of this rule. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Plaintiff May Not Dismiss If Defendant Has Asserted Grounds for Relief.** — A plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief, even though the plaintiff acts before resting his case. McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975), modified on other grounds, 289 N.C. 109, 221 S.E.2d 490 (1976).

A plaintiff in a civil action does not have the unfettered right to have the action dismissed by filing a notice of dismissal at any time before the plaintiff rests his case, regardless of whether defendant has filed an answer seeking affirmative relief. McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975), modified on other grounds, 289 N.C. 109, 221 S.E.2d 490 (1976).

Upon defendant's demand for affirmative relief defendant's right to have his claim adjudicated in the case "has supervened," and plaintiff thereby loses the right to withdraw (without defendant's consent) allegations upon which defendant's claim is based. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Where the complaint in a suit for an absolute divorce alleged facts entitling either or both of the parties to the marriage to an absolute divorce, defendant's answer admitting these allegations together with his prayer for an absolute divorce on the same grounds was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

**Section (b) is applicable only in a trial by the court** without a jury. Pergerson v. Williams, 9 N.C. App 512, 176 S.E.2d 885 (1970).

Section (b) has no application when considering a motion for a directed verdict in a jury trial. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

Section (b) applies only "in an action tried by the court without a jury." Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

A motion for a directed verdict under Rule 50(a) is proper when a trial is being held before a jury. Where a case is tried by the judge without a jury, the appropriate motion in such case is for involuntary dismissal under section (b) of this rule. Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971).

Section (b) is applicable where a cause is tried before the judge without a jury. Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

A motion to dismiss under this rule is not properly available in cases being tried by jury. The proper motion would be a motion for directed verdict under Rule 50(a). Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

When trial is by the court without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiff's evidence to show a right to relief is a motion for involuntary dismissal as provided for in section (b). Aiken v. Collins, 16 N.C. App. 504, 192 S.E.2d 617 (1972); Ayers v. Tomrich Corp., 17 N.C. App. 263, 193 S.E.2d 764 (1973).

**Thus, Involuntary Dismissal in Trial before Jury Treated as Directed Verdict.** — Where judgment of involuntary dismissal in a trial before a jury was improperly entered under section (b), which is applicable only in a trial by the court without a jury, it may properly be treated as a motion for a directed verdict under Rule 50(a). Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

**Directed Verdict Replaces Nonsuit in Jury Trials.** — In jury trials the motion for nonsuit has been replaced by the motion for a directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

**Where a case is tried before a jury, the appropriate motion** by which a defendant tests the sufficiency of plaintiff's evidence to permit a recovery is the motion for a directed verdict under Rule 50(a). The motion for involuntary dismissal, made under section (b), performs a similar function in an action tried by the court without a jury. Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

A motion for a directed verdict is proper only in a jury trial; where the case is tried without a jury the proper motion is for involuntary dismissal under section (b) of this rule. Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972).

**The distinction between a motion for a directed verdict and a motion for an involuntary dismissal** is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before court and jury than when the court alone is finder of the facts. Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

Motion for directed verdict under Rule 50 and the motion for involuntary dismissal under section (b) are to be distinguished; the former is proper when the case is tried before a jury, and the latter is appropriate where the court sits as trier of fact. McNeely v. Southern Ry., 19 N.C. App. 502, 199 S.E.2d 164, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973).

**Where Motion Incorrectly Designated as Motion for Directed Verdict.** — Though defendant's motion was incorrectly designated as a motion for directed verdict, the Court of Appeals may treat it as having been a motion for involuntary dismissal under section (b) and pass on the merits of the questions appellant seeks to raise. Higgins v. Builders & Fin., Inc., 20 N.C. App. 1, 200 S.E.2d 397 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

**The significance of the motion to dismiss under section (b)** of this rule is that it may be made at the close of the plaintiff's case; there is little point in such a motion at the close of all the evidence, since at that stage the judge will determine the facts in any event. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

In a nonjury case, section (b) of this rule provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973).

**Judge May Sustain Motion to Dismiss at Close of Plaintiff's Evidence.** — As trier of the facts, the judge may weigh the evidence, find the facts against the plaintiff and sustain the defendant's motion under section (b) of this rule at the conclusion of the plaintiff's evidence even though the plaintiff has made out a prima facie case which would have precluded a directed verdict for the defendant in a jury case. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Williams v. Liles, 31 N.C. App. 345, 229 S.E.2d 215 (1976).

If a trial judge allows the defendant's motion to dismiss made at the close of plaintiff's evidence on the grounds that upon the facts and the law the plaintiff has shown no right to relief, the court, as the trier of the facts, should determine the facts and render judgment against the plaintiff. Wells v. Sturdivant Life Ins. Co., 10 N.C. App. 584, 179 S.E.2d 806 (1971).

**But Is Not Compelled to Pass on Such Motion.** — The judge is not compelled to make determinations of facts and pass upon a motion under section (b) of this rule for involuntary dismissal at the close of plaintiff's evidence. He may decline to render any judgment until the close of all the evidence and, except in the clearest cases, he should defer judgment until the close of all the evidence. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

When a motion under this rule is made at the close of plaintiff's evidence, the judge may decline to render any judgment until the close of all of the evidence. Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973).

**No Provision for Section (b) Motion Made at Close of All Evidence.** — Section (b) does not provide for a motion for involuntary dismissal made at the close of all the evidence. Castle v. B.H. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973).

**Allowance of Such Motion Held Not to Prejudice Plaintiff.** — The fact that defendant made a motion for involuntary dismissal at the close of all the evidence, which motion is not sanctioned under the rules, and that the trial judge inadvertently allowed it, in no way prejudiced plaintiff where the trial judge thereafter entered a judgment on the merits pursuant to Rule 52. Castle v. B.H. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973).

**A motion for involuntary dismissal pursuant to this rule and Rule 60, prior to a trial of the cause** is improperly entertained, unless made on the specific grounds that the plaintiff has failed to prosecute or comply with the Rules of Civil Procedure or any order of the court. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

**Motion for Involuntary Dismissal at Close of Evidence.** — Section (b) does not provide for a motion for involuntary dismissal made at the close of all the evidence, but the fact that the parties made such motions at the close of all the evidence and that the trial judge ruled on those motions is of no consequence for thereafter the court rendered a judgment on the merits by making findings. Reid v. Midgett, 25 N.C. App. 456, 213 S.E.2d 379 (1975).

**Defendant's Motion Challenges Sufficiency of Plaintiff's Evidence.** — Defendant's motion for an involuntary dismissal in an action tried by the court without a jury challenges the sufficiency of the plaintiff's evidence to establish his right to relief. Wells v. Sturdivant Life Ins. Co., 10 N.C. App. 584, 179 S.E.2d 806 (1971).

A motion to dismiss under section (b) challenges the sufficiency of the plaintiff's evidence to establish his right to relief. Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d 65 (1971).

A motion to dismiss under this rule challenges the sufficiency of the evidence to permit a recovery. Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d 65 (1971).

In a case which has been tried without a jury, the proper motion by which to test the sufficiency of plaintiff's evidence to establish a right to relief was a motion for involuntary dismissal under section (b). Town of Rolesville v. Perry, 21 N.C. App. 354, 204 S.E.2d 719 (1974).

**Question Raised by Section (b).** — A motion under section (b) does not raise the question of whether the particular findings made by the court are supported by the evidence, but only the question of whether any findings could be made from the evidence which would support a recovery. Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d 65 (1971); Gibbs v. Heavlin, 22 N.C. App. 482, 206 S.E.2d 814 (1974).

A motion under section (b) raises the question of whether any findings of fact could be made from the evidence which would support' a recovery. Browne v. Catawba County Dep't of Social Servs., 22 N.C. App. 476, 206 S.E.2d 792 (1974).

**In determining the sufficiency of the evidence on a motion under this rule,** the trial judge is subject to the same principles applicable under the former procedure with respect to the sufficiency of the evidence to withstand the motion for nonsuit. Presson v. Presson, 12 N.C. App. 109, 182 S.E.2d 614 (1971).

**Present and Former Motions Presented Substantially Same Question.** — Substantially the same question is presented by a motion for dismissal under this rule as was by the former nonsuit motion. Schafran v. A & H Cleaners, Inc., 19 N.C. App. 365, 198 S.E.2d 734, cert. denied, 284 N.C. 255, 200 S.E.2d 655 (1973).

**Motion to dismiss differs from the former motion for judgment as for nonsuit** in that the lodging of a motion to dismiss under section (b) of this rule permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence even though plaintiff may have made out a prima facie case which would have repelled the motion for nonsuit under the former practice. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

**Question Presented by Former Motion for Nonsuit.** — Under the former practice the motion for nonsuit presented the question whether plaintiff's evidence, taken as true, would support findings upon which the trier of facts could properly base a judgment for plaintiff. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

**Function of Judge on Motion under Section (b).** — In a nonjury case, in which all issues of fact are in any event to be determined by the judge, the function of the judge on a motion to dismiss under section (b) of this rule is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case. Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970); Rogers v. City of Asheville, 14 N.C. App. 514, 188 S.E.2d 656 (1972); Lineberry v. Carolina Golf & Country Club, Inc., 16 N.C. App. 600, 192 S.E.2d 853 (1972); McNeely v. Southern Ry., 19 N.C. App. 502, 199 S.E.2d 164, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973).

In ruling on a motion to dismiss under section (b) of this rule, the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover. Airport Knitting, Inc. v. King Kotton Yarn Co., 11 N.C. App. 162, 180 S.E.2d 611 (1971); Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972); Ayers v. Tomrich Corp., 17 N.C. App. 263, 193 S.E.2d 764 (1973); Schafran v. A & H Cleaners, Inc., 19 N.C. App. 365, 198 S.E.2d 734, cert. denied, 284 N.C. 255, 200 S.E.2d 655 (1973); Town of Rolesville v. Perry, 21 N.C. App. 354, 204 S.E.2d 719 (1974).

When the judge decides the case on a motion for dismissal under section (b) of this rule, he must make findings of fact and state separately his conclusions of law. Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision and to make definite what was decided for purpose of res judicata and estoppel. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

On a motion to dismiss defendant's counterclaim under section (b), where all the evidence is in, it is incumbent upon the judge to consider and weigh it all, and render judgment on the merits of the claim and counterclaim in the form directed by Rule 52(a). Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

The judge's evaluation of the evidence pursuant to a motion under this rule is to be conducted free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for a directed verdict in a jury case. Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973).

The trial judge's evaluation of the evidence pursuant to a motion to dismiss is to be made free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for a directed verdict. Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

Except in the clearest cases, it is the better practice in the case of a motion to dismiss for the trial judge to decline to render judgment until all the evidence is in. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Under section (b) in a trial without a jury, the trial judge does not consider the evidence in the light most favorable to the plaintiff. Instead, he must consider and weigh all the competent evidence before him, passing upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. Inland Bridge Co. v. North Carolina State Hwy. Comm'n, 30 N.C. App. 535, 227 S.E.2d 648 (1976).

**Facts Found by Judge on Motion to Dismiss Are Conclusive on Appeal.** — Where, on a motion to dismiss, the trial court as the trier of the facts has found the facts specially, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which might sustain findings to the contrary. In such case the trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected. Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971).

In ruling on a motion for involuntary dismissal under section (b), where the trial court, as the trier of facts, has found specific facts, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which would sustain findings to the contrary. Williams v. Liles, 31 N.C. App. 345, 229 S.E.2d 215 (1976).

**Where the order dismissing plaintiff's claim is not supported by findings of fact** as required by section (b) of this rule, the judgment appealed from will be vacated and the cause remanded to the district court. Carteret County Gen. Hosp. Corp. v. Manning, 18 N.C. App. 298, 196 S.E.2d 538 (1973).

**Authority to Determine Whether Plaintiff May Commence New Action.** — The authority to determine in which cases it is appropriate to allow the plaintiff to commence a new action has been vested, by this rule, in the trial or hearing judge and is no longer strictly controlled by statute. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

**Rule Does Not Contain Old Restrictions as to New Actions.** — This rule does not contain the old restrictions that a new action may be brought only when the plaintiff's original action has been nonsuited, or a judgment therein reversed on appeal, or arrested. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

**Dismissal with Prejudice Is Subject to Usual Rules of Res Judicata.** — Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective not only on the immediate parties but also on their privies. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

**Extent Dismissal with Prejudice Precludes Subsequent Litigation.** — A dismissal with prejudice precludes subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

The dismissal of a plaintiff's claim against an employee "with prejudice" bars further prosecution of that claim against the employee and, insofar as he is concerned, is equivalent to a judgment on the merits in his favor; the dismissal should have the same result for the employer whose liability, if any, is derived solely from that of the employee. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

**The words "with prejudice" are plain** and should be given their plain meaning. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

**A dismissal "with prejudice" is the converse of a dismissal "without prejudice"** and indicates a disposition on the merits. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

**Dismissal for Failure to Prosecute.** — This rule, substantially the same as its federal counterpart, authorizes dismissal with prejudice of a plaintiff's claim for failure to prosecute. Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

Dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion. Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

Where plaintiff's failure to proceed did not arise out of a deliberate attempt to delay, but out of misunderstanding, dismissal was improper. Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

**Dismissal for Failure to Join Party Is Not on Merits.** — Dismissal for failure to join a necessary party or a proper party which the court, in its discretion, decides should be joined is not a dismissal on the merits and may not be with prejudice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

**Proper Party in Declaratory Judgment Action.** — Where the pleadings and the stipulated facts show a bona fide controversy justiciable under the Declaratory Judgment Act, the pleadings and stipulations raise issues of fact and questions of law common to all the parties, and defendant's rights must of necessity be affected by a final judgment, then the defendant is a proper and necessary party. First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

**Dismissal as to One of Several Defendants.** — Where questions of law and fact were raised by the complaint which were common to all of the named defendants, and a justiciable controversy was asserted between the parties, and the complaint alleged that one of the defendants was a permissive and necessary party in the action, the trial judge committed error in allowing the motion of that defendant to dismiss the action as to her under section (b) of this rule. First-Citizens Bank & Trust Co. v. Carr, 10 N.C. App. 610, 179 S.E.2d 838, rev'd on other grounds, 279 N.C. 539, 184 S.E.2d 268 (1971).

**Federal Rule 41(d) speaks to the same evil but provides for far different remedial measures** than this rule. Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

**Federal Rule in Direct Conflict with Section (d).** — The remedial measures provided for the failure of a plaintiff to pay the costs of a previously dismissed action of federal Rule 41 are in direct conflict with that set forth in section (d). Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

Although the federal rule might well authorize eventual dismissal of a recalcitrant plaintiff via federal Rule 41(b), perfunctory dismissal as prescribed by section (d) of this rule is clearly not contemplated or authorized. Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

**The provision for dismissal upon failure to pay costs has no counterpart in the federal rules.** Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

**And is couched in unambiguous mandatory language.** Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

The language of section (d) constitutes a mandatory directive to the trial court. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Payment of costs taxed in the first action is a mandatory condition precedent to the bringing of a second action on the same claim. Plaintiffs are in no position to claim surprise or prejudice for failing to comply with a requirement that conditions their right to reinstate their previous action. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Section (d) is explicit and mandatory in its direction to the court to dismiss an action brought by a plaintiff who has not paid the costs of a previous similar action dismissed pursuant to section (a). Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

**Defendant did not waive its rights under section (d)** by failing to assert them in a responsive pleading. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73 (1973).

**Dismissal of New Action Where Costs in Original Action Not Paid.** — Where a plaintiff had taken a voluntary nonsuit in the original action against the defendant, and when the new action was instituted, the costs in the original action had not been paid, then nothing else appearing, upon motion of the defendant, dismissal was proper on the grounds that this new action was instituted before the costs in the original action were paid. Galligan v. Smith, 14 N.C. App. 220, 188 S.E.2d 31, cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972).

**Review of Judgment Determining Court's Authority to Dismiss.** — A judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972).

**Applied** in Perry v. Suggs, 9 N.C. App. 128, 175 S.E.2d 696 (1970); First Nat'l Bank v. Black, 10 N.C. App. 270, 178 S.E.2d 108 (1970); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872 (1971); Hobson Constr. Co. v. Holiday Inns, Inc., 14 N.C. App. 475, 188 S.E.2d 617 (1972); Ramsey v. Ramsey, 16 N.C. App. 614, 192 S.E.2d 664 (1972); Smoky Mountain Enterprises, Inc. v. Rose, 283 N.C. 373, 196 S.E.2d 189 (1973); Livengood v. Piedmont & N. Ry., 18 N.C. App. 352, 197 S.E.2d 66 (1973); Forbes v. Pillmon, 18 N.C. App. 439, 197 S.E.2d 226 (1973); Atkins v. Walker, 19 N.C. App. 119, 198 S.E.2d 101 (1973); Cato Ladies Modes of N.C., Inc. v. Pope, 21 N.C. App. 133, 203 S.E.2d 405 (1974); Moore v. Wachovia Bank & Trust Co., 24 N.C. App. 675, 212 S.E.2d 170 (1975); Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740 (1975); Roger Staley, Inc. v. Waco Realty Co., 27 N.C. App. 541, 219 S.E.2d 654 (1975); Baltzley v. Wiseman, 28 N.C. App. 678, 222 S.E.2d 733 (1976); Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977); Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977).

**Cited** in Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970); Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971); Ross v. Perry, 12 N.C. App. 47, 182 S.E.2d 655 (1971); McElrath v. State Capital Ins. Co., 13 N.C. App. 211, 184 S.E.2d 912 (1971); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Mayberry v. Campbell, 16 N.C. App. 375, 192 S.E.2d 27 (1972); Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972); Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973); Briggs v. Briggs, 21 N.C. App. 674, 205 S.E.2d 547 (1974); Marriott Fin. Servs., Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975); Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975); Hall v. GMC, 27 N.C. App. 202, 218 S.E.2d 721 (1975); Carolina Bldrs. Corp. v. Palms Constr. Co., 29 N.C. App. 667, 225 S.E.2d 628 (1976); Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976); Hackett v. Hackett, 31 N.C. App. 217, 228 S.E.2d 758 (1976).

## Rule 42. Consolidation; separate trials.

**Rule 20(b) Confers Same Power as Section (b).** — Section (b), which gives to the trial judge general power to sever, confers the same power contemplated by Rule 20(b). Aetna Ins. Co. v. Carroll's Transfer, Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

Although the basic philosophy of the party joinder provisions is to allow relatively unrestricted initial joinder, there are provisions in Rule 20(b) and section (b) for the trial judge to sever and order separate trials. Aetna Ins. Co. v. Carroll's Transfer, Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**Severance Is Within Discretion of Trial Judge.** — Whether or not there should be severance rests in the sound discretion of the trial judge. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

**Decision as to Consolidation Is within Discretion of Trial Judge.** — Both cases being properly before the district court, it was within the discretion of the trial judge as to whether consolidation should be allowed. In re Moore, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

A trial court has the discretionary power, even ex mero motu, to consolidate actions for trial. He may do so even though the actions are instituted by different plaintiffs against a common defendant, or by the same plaintiff against several defendants, when the causes of action grow out of the same transaction and substantially the same defenses are interposed, provided that such consolidation results in no prejudice or harmful complications to either party. Greenville City Bd. of Educ. v. Evans, 21 N.C. App. 493, 204 S.E.2d 899, cert. denied, 285 N.C. 588, 206 S.E.2d 862 (1974).

Trial court in the exercise of its discretion may consolidate several cases involving different plaintiffs against a common defendant when the causes of action grow out of the same transaction and substantially the same defenses are interposed if such consolidation does not result in prejudice or harmful complications to either party. Wood v. Brown, 25 N.C. App. 241, 212 S.E.2d 690, cert. denied, 287 N.C. 469, 215 S.E.2d 626 (1975).

**And Will Not Be Disturbed without Showing of Injury and Clear Abuse of Discretion.** — An action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. Moreover, when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom. In re Moore, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

**Applied** in Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 19 N.C. App. 678, 200 S.E.2d 668 (1973).

## Rule 43. Evidence.

**Section (b) of this rule changed the established law of the State applicable to civil cases,** while the rule against impeachment of one's own witnesses in criminal cases remains unchanged. State v. Anderson, 283 N.C. 218, 195 S.E.2d 561 (1973).

**And Is Counterpart to Rule 26(e).** — See Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Section (b) of this rule is applicable when a plaintiff, instead of introducing the adverse examination of the defendant, calls the defendant as an adverse witness to testify at trial. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

The rule applicable to the testimony at trial of an adverse party under section (b) of this rule is equally applicable to the adverse party's testimony under adverse examination under Rule 26(e). Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

In marking the distinction between the introduction and use of the testimony of an adverse party, whether obtained by adverse examination prior to trial or at trial, and the introduction and use of the testimony of a witness other than a party, whether obtained by deposition or at trial, both Rule 26(e) and section (b) of this rule recognize that the self-interest of the adverse party bears upon the credibility of that portion of his testimony which tends to exculpate him and to place blame upon another. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

**A party calling his adversary as a witness is not concluded by his uncontradicted testimony,** but may rely on such portion of his testimony as is favorable to him and is not bound by adverse testimony. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

**Eliciting Facts Showing Hostility of Witness.** — A party to either a civil or criminal proceeding may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him, hostile to his cause or interested adversely to him in the outcome of the litigation. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

**Section (c) does not state time to be of the essence** in making a motion to let the record show the answers that would have been given to questions to which the objections were sustained. State v. Willis, 20 N.C. App. 43, 200 S.E.2d 408 (1973), aff'd, 285 N.C. 195, 204 S.E.2d 33 (1974).

**Use of Deposition at Trial Is Limited.** — Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial state is sharply limited. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

**Admissibility of Deposition where Deponent Not a Party.** — Where the record contained no indication by evidence or stipulation as to the whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in Rule 26(d)(3) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

**Evidence by Affidavits May Be Considered.** — Both before and after the adoption of the new Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of § 1-485 does not prohibit this. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of § 1-485 for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

**Admissibility of Oral Testimony on Motions.** — Oral testimony at a hearing on a motion for summary judgment is admissible by virtue of section (e). Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

**Oral Testimony to Be Used Only in Supplementary Capacity.** — Under section (e), oral testimony offered at a hearing on a Rule 56 motion for summary judgment should be used only in a supplementary capacity to provide a small link of required evidence, and not as the main evidentiary body of the hearing. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

Although section (e) does permit the court to hear oral testimony in ruling upon a motion for summary judgment, this procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

**Showing of Prejudicial Exclusion on Appeal.** — The exclusion of testimony cannot be held prejudicial on appeal unless the appellant shows what the witness would have testified if permitted to do so. Spinella v. Pearce, 12 N.C. App. 121, 182 S.E.2d 620 (1971); Gibbs v. Duke, 32 N.C. App. 439, 232 S.E.2d 484 (1977).

**Applied** in Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

**Stated** in Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

**Cited** in Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975); State v. Pope, 24 N.C. App. 644, 211 S.E.2d 841 (1975).

## Rule 44. Proof of official record.

**Applied** in Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Downey v. Downey, 29 N.C. App. 375, 224 S.E.2d 255 (1976).

**Cited** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

## Rule 45. Subpoena.

(a) *For attendance of witnesses; issuances; form.* — A subpoena for the purpose of obtaining the testimony of a witness in a pending cause shall, except as hereinafter provided, be issued at the request of any party by the clerk of superior court for the county in which the hearing or trial is to be held. A subpoena shall be directed to the witness, shall state the name of the court and the title of the action, the name of the party at whose instance the witness is summoned, and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. A subpoena for a witness or witnesses need not be signed by the clerk, and is sufficient if signed by the party or his attorney.

(d) *Subpoena for taking depositions.* —

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated records, books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of section (c) of Rule 26 and section (c) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) Repealed by Session Laws 1975, c. 762, s. 3, effective January 1, 1976.

(e) *Service.* — All subpoenas may be served by the sheriff, by his deputy, by a coroner or by any other person not less than 18 years of age, who is not a party. Service of a subpoena for the production of documentary evidence may be made only by the delivery of a copy to the person named therein or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness may be made by telephone communication with the person named therein only by a sheriff, his deputy, or a coroner, or by delivery of a copy to the person named therein or by registered or certified mail, return receipt requested, by any person authorized by this section to serve subpoenas. Personal service shall be proved by return of a sheriff, his deputy, or a coroner making service and by return under oath of any other person making service. Service by telephone communication shall be proved by return of the process officer, noting the method of service. Service by registered or certified mail shall be proved by filing the return receipt with the return.

(1971, c. 159; 1975, c. 762, s. 3.)

**Comment — 1975 Amendment.** — Since only sections (d) and (e) are affected by the proposed amendments, the remaining sections are not reproduced.

*Section (d).* — The reference in subsection (d)(1) is amended to conform to the relocation of the section to which it refers. The second paragraph of subsection (d)(1) is borrowed from the federal rule. Former subsection (d)(2) is relocated to Rule 30(b)(1) where, as modified, it applies to all deponents, and not just those whose presence can be compelled only by subpoena.

*Section (e).* — This provision is amended to require service of a copy of a subpoena duces tecum by delivery or by registered or certified mail and to allow a person other than a sheriff, his deputy or a coroner to serve a subpoena for the attendance of a witness by registered or certified mail. The amendment also requires the server to be of legal age.

**Editor's Note.** —

The 1971 amendment added the last sentence in section (a).

The 1975 amendment substituted "section (c) of Rule 26" for "section (b) of Rule 30" near the end of the first paragraph of subsection (d)(1), added the second paragraph of that subsection, repealed subsection (2) of section (d), which related to the places where a person could be required to attend for examination by deposition and rewrote section (e).

The 1975 amendatory act, in amending sections (d)(1) and (e), referred to Rule 41. Rule 45 was plainly intended.

Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

As the rest of the rule was not changed by the amendments, only sections (a), (d) and (e) are set out.

**Applied** in State v. Neely, 26 N.C. App. 707, 217 S.E.2d 94 (1975); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

**Cited** in Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Williams v. Williams, 18 N.C. App. 635, 197 S.E.2d 629 (1973); Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975); State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

## Rule 46. Objections and exceptions.

**Court May Exclude Evidence on Its Own Motion.** — In the exercise of its right to control and regulate the conduct of the trial, a trial court may, of its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence; the exercise of such right must be kept within proper bounds. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

**Applied** in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976).

## Rule 49. Verdicts.

**Purpose.** — This rule was designed to prevent otherwise proper trials from being jeopardized through the inadvertent omission of an issue. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

**Section (b) contains substantially the same language as former § 1-200,** which latter statute was in force prior to January 1, 1970, the effective date of § 1A-1. Brant v. Compton, 16 N.C. App. 184, 191 S.E.2d 383, cert. denied, 282 N.C. 672, 196 S.E.2d 809 (1972).

**The judge is required, etc.** —

In accord with 3rd paragraph in original. See Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

It is the duty of the trial judge to submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

**The issues to be submitted to the jury** are those raised by the pleadings and supported by the evidence. Johnson v. Massengill, 280 N.C. 376, 186 S.E.2d 168 (1972).

**Ordinarily, the form, etc.** —

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

Ordinarily it is within the sound discretion of the trial judge as to the form of the issues. Brant v. Compton, 16 N.C. App. 184, 191 S.E.2d 383, cert. denied, 282 N.C. 672, 196 S.E.2d 809 (1972).

**If the parties consent to the issues submitted or do not object** at the time or ask for different or additional issues, the objection cannot be made later. Brant v. Compton, 16 N.C. App. 184, 191 S.E.2d 383, cert. denied, 282 N.C. 672, 196 S.E.2d 809 (1972).

**Separate Submission of Related Issues Not Error.** — Where the allegations of the complaint were sufficient to justify submission to the jury of the questions of fraud, duress and undue influence, which are not synonymous, although they overlap to some degree, submission of these several possibilities in a single issue would have been confusing and would have necessitated an exceedingly complicated charge;

and there was no abuse of the trial court's discretion in their submission as three separate issues. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

**Refusal to Submit Issue Was Proper.** — The trial court did not err in failing to submit an issue as to whether the parties had entered into a contract as alleged in the complaint, where defendant did not deny plaintiff's allegations as to the making of the contract or the terms thereof and did not allege a different contract, and where defendant made no demand for the submission of such an issue. Johnson v. Massengill, 280 N.C. 376, 186 S.E.2d 168 (1972).

**Insufficient Issues.** —

Where the evidence presented was ample to allow the jury to make a finding on an issue the trial court erred by not submitting the issue requested. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

**An issue of fact, etc.** —

Issues in a case arise only upon the controverted material facts raised by the pleadings and supported by the evidence. Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

**Before a verdict is complete it must be accepted** by the court. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

**The trial judge may vacate the answer to a particular issue** when to do so does not affect or alter the import of the answers to the other issues. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

**Waiver of Right to Submit Issue.** — Assuming the plaintiff's evidence warranted the submission of an issue of punitive damages, plaintiff waived his right to have this issue submitted when he tendered to the court the issues which were submitted and failed to request the submission of an issue of punitive damages. Frazier v. Glasgow, 24 N.C. App. 641, 211 S.E.2d 852, cert. denied, 286 N.C. 722, 213 S.E.2d 721 (1975).

When defendants neither objected to an issue which was submitted to the jury nor requested the court to submit the issue, they waived their right to have such issue passed upon by the jury. Van Poole v. Messer, 25 N.C. App. 203, 212 S.E.2d 548 (1975).

The right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

**Where the jury's findings are indefinite or inconsistent**, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict, but he may not tell them what their verdict shall be. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

In an action to recover on a written contract of guaranty where the trial judge noted inconsistency in the jury's answers to the third and fourth issues, which related only to the amount of damages, it was within the court's sound discretion to either resubmit all issues or resubmit only on issues as to damages. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

It is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

**Finding in Accord with the Judgment Entered.** — Where an alleged usage of trade was not in writing, the question of its existence was not submitted to the jury as an issue of fact, and plaintiff made no demand for its submission before the jury retired, and since the trial judge himself made no finding on the issue, he was "deemed to have made a finding in accord with the judgment entered." Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

## Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

**Comment — 1969 Amendment.** — Rule 50, both in its old version and in the new, contemplates that when a party moves for a directed verdict and his motion is denied or for any reason is not granted, that party may, after an adverse verdict or the failure of the jury to return a verdict, move for judgment notwithstanding the verdict. When the movant for a directed verdict who is not immediately successful later moves for a judgment notwithstanding the verdict and his motion is granted or denied, and there is an appeal, the powers of the appellate court are reasonably clear, as outlined in section 50(c) and (d). But when the movant for a directed verdict later fails to move for a judgment notwithstanding the verdict, there has been in the federal courts uncertainty about the powers of an appellate court. See 5 Moore's Federal Practice, §§ 2365-2374. The uncertainty revolves around the question of whether an appellate court can direct entry of judgment for a party who was erroneously denied a directed verdict but who later failed to move, as the rule contemplates, for a motion for judgment notwithstanding the verdict. The Supreme Court ruled in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947), that in the circumstances outlined the appellate court was limited to directing a new trial.

It might be said that the rationale of the court's ruling in the *Cone* case rests on a desire that no final conclusive judgment be rendered against a party unless the trial judge has had an opportunity to consider whether the loser should be given another chance. The trial judge would not have this opportunity in the absence of some such rule as that enunciated in *Cone.*

The Commission has from the first embraced the *Cone* result. The Commission has gone further and attempted to meet some of the problems spawned by the *Cone* decision.

Its first effort was the rather clumsy one comprised in the last two sentences of Rule 50(b) as it was originally enacted. These two sentences have now been deleted and they should be forgotten.

In their stead, the General Assembly has added a new final sentence to what is now section 50(b)(1) and a new section 50(b)(2). These additions make clear the power of a trial judge, once there has been a motion for a directed verdict, to consider on his own motion, after entry of judgment (see Rule 58 as to when judgment is deemed to be entered), entry of judgment in accordance with the directed verdict motion. The additions also make clear that without some post-verdict consideration of a motion for judgment or the reserved motion for a directed verdict, the appellate court cannot, if it should find erroneous the failure to grant the motion for directed verdict, direct entry of judgment for the appellant but can only order a new trial.

**Editor's Note. —**

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**The purpose of this rule** is to apprise the court and the adverse parties of movants' grounds for the motion. Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974).

**Difference between Directed Verdicts in Criminal and Civil Cases.** — For a discussion of the difference between directed verdicts in criminal and civil cases, see State v. Riley, 113 N.C. 648, 18 S.E. 168 (1893); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Right to Jury Trial Guaranteed.** — North Carolina Const., Art. I, § 25, has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Jury Determines Issue Where More than One Conclusion Can Be Drawn.** — Where more than one conclusion can reasonably be drawn, determination of the issue is properly for the jury. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816, cert. denied, 278 N.C. 522, 180 S.E.2d 610 (1971).

**Discrepancies and contradictions in the evidence are to be resolved by the jury** and not by the court. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

Contradictions or discrepancies in the evidence on a motion for a directed verdict even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

**Directed verdicts are appropriate only in jury cases.** Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Town of Rolesville v. Perry, 21 N.C. App. 354, 204 S.E.2d 719 (1974).

When plaintiff filed its motion asking the trial court to approve and adopt the referee's report, it inappropriately made a directed verdict. A motion for directed verdict and a directed verdict are not proper where the trial is before the judge sitting without a jury. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

A motion for a directed verdict under section (a) of this rule is proper when a trial is being held before a jury. Where a case is tried by the judge without a jury, the appropriate motion in such case is for involuntary dismissal under Rule 41(b). Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

A motion for directed verdict under section (a) is appropriate when trial is held before a jury. Aiken v. Collins, 16 N.C. App. 504, 192 S.E.2d 617 (1972).

A motion for a directed verdict is appropriate in cases tried by jury. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Directed verdicts are appropriate only in jury cases. In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under Rule 41(b). Higgins v. Builders & Fin., Inc., 20 N.C. App. 1, 200 S.E.2d 397 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

**Motion for Directed Verdict and Motion for Nonsuit Compared.** — A motion for directed verdict under the new rules produces virtually the same effect and ordinarily will be treated the same as a motion for nonsuit under the old rules in determining whether the evidence should be submitted to the jury. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal, in jury trials by the motion for a directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

The motion for a directed verdict presents substantially the same question for sufficiency as did a motion for an involuntary nonsuit formerly. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972).

The motion for directed verdict presents substantially the same question for sufficiency as did a motion for an involuntary nonsuit under former § 1-183. Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972); McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

A motion for a directed verdict presents substantially the same question as did a motion for judgment as of nonsuit. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**The distinction between a motion for a directed verdict and a motion for an involuntary dismissal** is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before court and jury than when the court alone is finder of the facts. Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

Motion for directed verdict under this rule and the motion for involuntary dismissal under Rule 41(b) are to be distinguished; the former is proper when the case is tried before a jury, and the latter is appropriate where the court sits as trier of fact. McNeely v. Southern Ry., 19 N.C. App. 502, 199 S.E.2d 164, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973).

**Function of Rule 41(b) Similar to Section (a).** — Where a case is tried before a jury, the appropriate motion by which a defendant tests the sufficiency of plaintiff's evidence to permit a recovery is the motion for a directed verdict under section (a). The motion for involuntary dismissal, made under Rule 41(b), performs a similar function in an action tried by the court without a jury. Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

A motion to dismiss under Rule 41(b) is properly made only in cases tried by a judge without a jury, while the proper motion in jury cases is for a directed verdict under section (a) of this rule. Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

**Classes of Cases Not Ordinarily Subject to Directed Verdict.** — Those classes of cases not subject to nonsuit under the old rules would not be ordinarily subject to directed verdict under the new rules. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

A nonsuit was prohibited in caveat proceedings. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

A judgment of nonsuit could not be entered in a declaratory judgment action. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

Since the nonsuit and directed verdict are so analogous, directed verdict in a declaratory judgment action was not appropriate, but upon the evidence, a peremptory instruction would have been appropriate. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

**In a jury trial, the motion for a directed verdict** is the only device by which the adverse party can challenge the sufficiency of the evidence to go to the jury. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

In a case tried to a jury, after a plaintiff has put on evidence and rested, a defendant who asserts that the evidence of the plaintiff is insufficient to permit a recovery is restricted to making a motion for a directed verdict under section (a) of this rule. Creasman v. First Fed. Sav. & Loan Ass'n, 10 N.C. App. 182, 177 S.E.2d 770 (1970), aff'd, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

The motion for a directed verdict is now the only procedure by which a party can challenge the sufficiency of his adversary's evidence to go to the jury. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

When a case is tried by a jury a defendant may move for a directed verdict to test the sufficiency of the evidence to go to the jury. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**Involuntary Dismissal in Jury Trial Treated as Directed Verdict.** — Where judgment of involuntary dismissal in a trial before a jury was improperly entered under Rule 41(b), which is applicable only in a trial by the court without a jury, it may properly be treated as a motion for a directed verdict under this rule. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Defendants' motion for "dismissal" on grounds of insufficient evidence to go to the jury, rather than for a "directed verdict," is not fatal where the defendants stated grounds entitling them to a directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 10 N.C. App. 182, 177 S.E.2d 770 (1970), aff'd, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

Where a motion for dismissal is made pursuant to Rule 41(b) in a jury case, it may properly be treated as a motion for directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

**Motion for "Judgment of Nonsuit" Treated as Motion for Directed Verdict.** — Defendant's motion for "judgment of nonsuit" made at the close of plaintiff's evidence, and again at the close of all the evidence was treated as a motion for a directed verdict under this rule. The new rules contemplate that the name of the motion is not as important as the substance. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Judgment entered upon a directed verdict is a final judgment on the merits.** Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972).

When granted, the common-law motion for a directed verdict resulted in a judgment on the merits in either a criminal or a civil case. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**It is therefore appealable, and operates with full res judicata effect.** Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972).

**Defendant Is Entitled to Judgment on Merits when Motion for Directed Verdict Granted.** — When a motion for a directed verdict under this rule is granted, the defendant is entitled to a judgment on the merits. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When a defendant's motion for a directed verdict under this rule is granted, the defendant is entitled to judgment. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Unless Court Permits Voluntary Dismissal under Rule 41(a)(2).** — When a motion for a directed verdict under this rule is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). The court may permit a voluntary dismissal upon such terms and conditions as justice requires. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When a defendant's motion for a directed verdict under this rule is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972).

At the instance of the plaintiff, the court may permit a voluntary dismissal upon such terms and conditions as justice requires. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Rule 41(b) has no application when considering a motion for a directed verdict** in a jury trial. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Judge May Enter Directed Verdict on His Own Motion.** — Under section (b)(1) of this rule a trial judge, on his own motion, may enter a directed verdict within 10 days after the jury is discharged for failing to reach a verdict. Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971).

The trial judge on his own motion, within the time prescribed in section (b)(1), may grant, deny, or redeny the motion for a directed verdict. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Seemingly to free the trial judge from dependence upon the initiative of a litigant after verdict to renew his motion for a directed verdict or for judgment notwithstanding the verdict, the General Assembly amended section (b) as originally proposed, by substituting therefor sections (b)(1) and (b)(2). Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**Defendant Waives Motion by Offering Evidence.** — By offering evidence, defendant waives his motion for directed verdict made at the close of plaintiff's evidence. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972); Overman v. Gibson Prods. Co. of Thomasville, Inc., 30 N.C. App. 516, 227 S.E.2d 159 (1976).

**Question Presented by Motion for Directed Verdict.** — The question presented by the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient for submission to the jury. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

The motion for a directed verdict in a jury trial presents the question whether the evidence, when considered in the light most favorable to the party against whom the motion is made, is sufficient for submission to the jury. Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

A defendant's motion for a directed verdict in a jury trial made under this rule presents the question whether the evidence is sufficient to entitle the plaintiff to have the jury pass on it. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816, cert. denied, 278 N.C. 522, 180 S.E.2d 610 (1971).

The defendant's motion for a directed verdict under this rule presents a question of law for decision by the court, namely, whether the evidence is sufficient to entitle the plaintiff to have the jury pass on it. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

The defendant's motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

A motion for a directed verdict presents the question of whether, as a matter of law, the evidence offered by plaintiff, when considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

The question of law presented by defendant's motion for a directed verdict is whether plaintiff's evidence was sufficient for submission to the jury. Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971).

A defendant's motion made in a jury trial for a directed verdict presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. Raynor v. Foster, 12 N.C. App. 193, 182 S.E.2d 806, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971); Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973).

The motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor. American Personnel, Inc. v. Harbolick, 16 N.C. App. 107, 191 S.E.2d 412 (1972).

A motion for a directed verdict or judgment non obstante veredicto presents substantially the same question as that presented by a motion for nonsuit under former § 1-183. City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974).

Defendant's motion for a directed verdict presents the question whether the evidence, viewed in the light most favorable to plaintiffs, is legally sufficient to establish this premise. Investment Properties of Asheville, Inc. v. Allen, 283 N.C. 277, 196 S.E.2d 262 (1973).

A motion for directed verdict raises the question whether the evidence, considered in the light most favorable to the plaintiff, will justify a verdict in his favor. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973).

A motion for a directed verdict under section (a) presents substantially the same question as formerly presented by motion for judgment of nonsuit. Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

A motion by a defendant for a directed verdict under section (a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977).

Defendants' motion for directed verdict presented the question whether, as a matter of law, the evidence offered by plaintiffs, when considered in the light most favorable to them, was insufficient to be submitted to the jury. Penney v. Carpenter, 32 N.C. App. 147, 231 S.E.2d 171 (1977).

A motion under this rule is directed to the sufficiency of the evidence to justify a verdict for the plaintiff when considered in the light most favorable to him. Evans v. Carney, 29 N.C. App. 611, 225 S.E.2d 157 (1976).

**The proper test for disposition of a motion for a directed verdict or judgment non obstante veredicto** whether a motion on the ground of contributory negligence is to be granted or the issue submitted for jury determination must be decided after considering the facts of each particular case. City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

**Trial Court Should Not Make Findings of Fact or State Conclusions of Law.** — In resolving the question presented by a motion for directed verdict, it is not required or appropriate that the trial court make "findings of fact" and state "conclusions of law." Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

**Trial Judge Must Consider Evidence in Light Most Favorable to Plaintiff on Defendant's Motion for Directed Verdict.** — When a motion for directed verdict is made under this rule at the conclusion of the plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to the plaintiff and giving to it the benefit of every reasonable inference which can be drawn therefrom was sufficient to withstand defendant's motion for a directed verdict. Sawyer v. Shackleford, 8 N.C. App. 631, 175 S.E.2d 305 (1970).

In considering a motion for a directed verdict in favor of defendant, the evidence must be viewed in the light most favorable to plaintiff. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972); Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971); Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972);

Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972); McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974); Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975).

Upon a motion for a directed verdict made by a defendant under the provisions of this rule, all evidence which supports the plaintiff's claim must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in the plaintiff's favor. Ingold v. Carolina Power & Light Co., 11 N.C. App. 253, 181 S.E.2d 173 (1971).

Under this section all evidence which supports a plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970); Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816, cert. denied, 278 N.C. 522, 180 S.E.2d 610 (1971); Raynor v. Foster, 12 N.C. App. 193, 182 S.E.2d 806, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972); Rogers v. City of Asheville, 14 N.C. App. 514, 188 S.E.2d 656 (1972); Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903, cert. denied, 282 N.C. 430, 192 S.E.2d 840 (1972).

When a motion for directed verdict is made at the conclusion of the evidence, the trial court must determine whether the evidence, taken in the light most favorable to the plaintiff and giving the plaintiff the benefit of every reasonable inference, is sufficient. Riddick v. Whitaker, 13 N.C. App. 416, 185 S.E.2d 602, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972).

Upon motion for a directed verdict and judgment non obstante veredicto by defendant, the sufficiency of the evidence to take the case to the jury is drawn into question, and all of the evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. Kinston Bldg. Supply Co. v. Murphy, 13 N.C. App. 351, 185 S.E.2d 440 (1971).

Upon defendant's motion for a directed verdict, all of plaintiff's evidence must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences and resolving all inconsistencies in his favor. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

Upon defendant's motion under this rule, his own evidence may not be considered unless it is favorable to the plaintiff or unless it is not in conflict with the plaintiff's evidence and explains or makes clear that which has been ordered by the plaintiff. Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

In passing upon a motion for a directed verdict and the subsequent motion for a judgment notwithstanding the verdict based upon it, the testimony of plaintiff's witnesses must be accepted at face value. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973).

In passing upon a motion for a directed verdict, the court must consider the evidence in the light most favorable to the nonmovant. Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973).

On motion for a directed verdict all the evidence which tends to support the nonmovant's case against it must be taken as true and considered in the light most favorable to the nonmovant, which is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence. Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 198 S.E.2d 558 (1973).

On a motion for directed verdict, plaintiff's evidence is to be taken as true and all of the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues, which may be reasonably deduced from the evidence. Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974).

When defendant moves for a directed verdict, the evidence must be considered in the light most favorable to the plaintiff. Brooks v. Boucher, 22 N.C. App. 676, 207 S.E.2d 282, cert. denied, 286 N.C. 211, 209 S.E.2d 319 (1974); Prevatte v. Cabble, 24 N.C. App. 524, 211 S.E.2d 528 (1975).

When a defendant moves for a directed verdict pursuant to section (a) of this rule, the trial judge must take plaintiff's evidence to be true, consider all the evidence in the light most favorable to plaintiff and give him the benefit of every reasonable inference which may be legitimately drawn therefrom. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977).

On motion by a defendant for a directed verdict at close of plaintiff's evidence in a jury case, the evidence must be taken as true and considered in the light most favorable to plaintiff. Farmer v. Chaney, 292 N.C. 451, 233 S.E.2d 582 (1977).

**Conflicts Resolved in Opposing Party's Favor on Motion.** — In ruling on a motion for directed verdict the court must resolve any discrepancies in the evidence in favor of the party against whom the motion is made and must give that party the benefit of every legitimate inference which may be reasonably drawn from the evidence. Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971).

The evidence in favor of the nonmovant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973).

**Conflicts Resolved in Defendant's Favor in Passing on Plaintiff's Motion.** — Insofar as the defendant's testimony creates a conflict in his testimony, it must be resolved in his favor in passing on the plaintiff's motion for a directed verdict. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

**Judge May Consider Movant's Evidence on Motion for Directed Verdict.** — In passing upon motion for directed verdict made at the close of all the evidence, a defendant's evidence that tends to contradict or refute the plaintiff's evidence is not considered, but the other evidence presented by a defendant may be considered to the extent that it clarifies the plaintiff's case. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**Principles Guiding Determination of Sufficiency of Plaintiff's Evidence.** — In determining the sufficiency of a plaintiff's evidence to withstand a defendant's motion for a directed verdict in a jury case, the trial court and the Court of Appeals are guided by the same principles that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under former § 1-183. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Determination of the sufficiency of the evidence to withstand a motion for a directed verdict made by a defendant under the provisions of this rule is guided by the same principles that prevailed under the former procedure with respect to motion for nonsuit. Ingold v. Carolina Power & Light Co., 11 N.C. App. 253, 181 S.E.2d 173 (1971).

In deciding whether the evidence was sufficient to entitle a plaintiff to have the jury pass on it, the court should give no consideration to the fact that the jury may have failed to reach a verdict, but should consider only the evidence in the case. Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971).

In deciding whether a plaintiff's evidence is sufficient to withstand a defendant's motion for a directed verdict in a jury case, both the trial and appellate courts must adhere to the same principles that governed under the former procedure with regard to sufficiency of evidence to withstand a motion for nonsuit. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

**Verdict Directed for Defendant Where Plaintiff Shows No Right to Relief.** — When it is clear that the plaintiff has shown no right to relief, the judge will direct a verdict for the defendant at the close of plaintiff's evidence just as he could formerly grant a motion for compulsory nonsuit. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

As was true of a compulsory nonsuit, a directed verdict for defendant is not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977).

**Evidence Raising Only Conjecture Is Not Sufficient to Withstand Motion.** — Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion by defendant for a directed verdict. Ingold v. Carolina Power & Light Co., 11 N.C. App. 253, 181 S.E.2d 173 (1971).

**The judge may direct a verdict only when the issue submitted presents a question of law based on admitted facts.** Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

Where, in view of facts which were stipulated before trial and admitted by defendant at trial, the issue presented only a question of law for the court, the general rule that the court cannot direct a verdict in favor of a party having the burden of proof does not apply. American Personnel, Inc. v. Harbolick, 16 N.C. App. 107, 191 S.E.2d 412 (1972).

North Carolina allows directed verdicts only when the evidence presents a question of law based on admitted facts. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Sufficiency of Evidence Is Question of Law.** — When the defendant has moved for a directed verdict, and the trial court considers all the evidence in the light most favorable to the plaintiff, whether this evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court. Prevatte v. Cabble, 24 N.C. App. 524, 211 S.E.2d 528 (1975).

**The court can always direct a verdict against the party with the burden of proof,** if there is no evidence in his favor. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

The court may direct a verdict against the party having the burden of proof when there is no evidence in his favor. Roberts v. William N.

& Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**But a verdict may never be directed when the facts are in dispute.** Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

**Thus, the judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof** even though the evidence is uncontradicted. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Under this rule, the trial judge cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Ordinarily, it is not permissible to direct a verdict in favor of a litigant on whom rests the burden of proof. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

This rule, which deals only with jury trials, does not purport to confer upon the judge the power to pass upon the credibility of the evidence and to direct a verdict in favor of the party having the burden of proof. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Where the burden of proof on the issues of negligence and agency was on the plaintiff, it was error for the court to direct a verdict in favor of plaintiff on those issues. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

The party having the burden of proof on all the issues is not entitled to a directed verdict. Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971).

**Since defendant's denial of an alleged fact raises an issue as to its existence** even though he offers no evidence tending to contradict that offered by plaintiff. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**And the credibility of testimony is for the jury,** not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Price v. Conley, 21 N.C. App. 326, 204 S.E.2d 178 (1974).

The jury and not the judge passes on credibility. Hinson v. Sparrow, 21 N.C. App. 554, 204 S.E.2d 925 (1974).

**Though Whether "Genuine Issue of Fact" Exists Is Preliminary Question for Judge.** — See Price v. Conley, 21 N.C. App. 326, 204 S.E.2d 178 (1974).

**But Court May Give Peremptory Instruction in Favor of Party with Burden of Proof.** — When there is no conflict in the evidence and but one inference is permissible from it, the court may give a peremptory instruction in favor of the party having the burden of proof. Such an instruction directs the jury to answer the issue in favor of the plaintiff if it finds the facts to be as all the evidence tends to show; otherwise not. To so instruct is not to direct a verdict. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction — that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**A peremptory instruction does not deprive the jury of its right to reject the evidence** because of lack of faith in its credibility. Such an instruction differs from a directed verdict. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**A directed verdict becomes proper against the defendants who have the burden on affirmative defenses** if their evidence is insufficient to carry those defenses to the jury. Sufficiency of evidence is a question of law to be determined by the court. Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

**When Directed Verdict in Favor of Party with Burden of Proof Is Permissible.** — When facts are judicially admitted and are no longer a subject of inquiry, then directing a verdict in favor of a litigant on whom rests the burden of proof is not only permissible, but it is the duty of the judge to answer the issue. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

After looking at all of the evidence, if no other reasonable conclusion is possible then a directed verdict would be proper even though such directed verdict is in favor of the litigant upon whom rests the burden of proof. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

When all of the evidence has been introduced, the facts established and a defendant has proved himself negligent, there is no factual issue of negligence remaining as a subject of inquiry, and on this issue there is no duty resting upon the jury. In a situation of this kind, it is no longer necessary for the jury to intervene, and the trial judge should enter a directed verdict. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

The Court of Appeals has customarily adopted a rule of entering a judgment of nonsuit against a plaintiff when the plaintiff's own evidence establishes contributory negligence. This is tantamount to directing a verdict in favor of the party with the burden of proof. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

A directed verdict against the plaintiff is proper in a negligence case only when contributory negligence is so clearly established that no other conclusion can reasonably be reached. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

The granting of a directed verdict for the party with the burden of proof is permissible when the only evidence is plaintiff's own evidence and defendant's burden is met for him by the plaintiff. Alligood v. Seaboard Coastline R.R., 21 N.C. App. 419, 204 S.E.2d 706 (1974).

**Directed Verdict When Plaintiff's Evidence Shows Contributory Negligence.** — A directed verdict on the ground that plaintiff's evidence reveals contributory negligence as a matter of law is proper only when contributory negligence is so clearly established that no other conclusion can reasonably be reached. Riddick v. Whitaker, 13 N.C. App. 416, 185 S.E.2d 602, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972).

In an action for wrongful death, a directed verdict for the defendant on the ground of contributory negligence should be granted when, and only when, the evidence, taken in the light most favorable to plaintiff, establishes the contributory negligence of plaintiff's intestate so clearly that no other reasonable inference or conclusion may be drawn therefrom. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

A directed verdict will not be entered on the ground of contributory negligence unless the evidence, taken in the light most favorable to plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975).

Directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence, taken in the light most favorable to plaintiff, establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

A motion for directed verdict upon the ground of contributory negligence should be allowed only when plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. Peeler v. Southern Ry., 32 N.C. App. 759, 233 S.E.2d 685 (1977).

**Defendant's denial of an alleged fact** raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. Weeks Motor Co. v. Daniels, 18 N.C. App. 442, 197 S.E.2d 29 (1973).

When defendants denied material allegations of plaintiff, defendants raised an issue as to their existence. The facts being in dispute the case became one for jury determination and the court erred in directing a verdict in plaintiff's favor. Weeks Motor Co. v. Daniels, 18 N.C. App. 442, 197 S.E.2d 29 (1973).

**Evidence Requiring Speculation Should Not Be Submitted to Jury.** — Evidence which raises only a conjecture of negligence may not properly be submitted to the jury. To hold that evidence that a defendant could have been negligent is sufficient to go to a jury, in the absence of any evidence, direct or circumstantial, that such a defendant actually was negligent, is to allow the jury to indulge in speculation and guesswork. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

Medical evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury. Sharpe v. Pugh, 21 N.C. App. 110, 203 S.E.2d 330, aff'd, 286 N.C. 209, 209 S.E.2d 456 (1974).

**The words, "without any assent of the jury,"** are used to dispel any apprehension that the jury is required to perform a perfunctory act in connection with the verdict in a case which is not submitted to it for determination. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Specific Grounds Must Be Stated in Motion for Directed Verdict.** — The provision of this rule which requires that "specific grounds" shall be stated in a motion for a directed verdict is mandatory. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970); Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974); Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975).

A motion for a directed verdict shall state the specific grounds therefor; this rule is mandatory. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

Since the statute expressly requires that "specific grounds" shall be stated in a motion for a directed verdict, this provision of the rule is mandatory. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

The requirement that grounds be stated on a motion for a directed verdict is mandatory. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**The better practice is to set forth the specific grounds in a written motion.** If the movant relies upon an oral statement for such specific grounds, a transcript thereof must be incorporated in the case on appeal. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent** to the court and the parties. Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974).

**Failure to State Grounds Is Sufficient Basis for Overruling Motion.** — A defendant's failure to state the grounds for his motions for a directed verdict is sufficient basis for the court's overruling them. Dixon v. Shelton, 9 N.C. App. 392, 176 S.E.2d 390 (1970).

**This rule has nothing to do with broadening appellate jurisdiction.** Samia v. A.J. Ballard, Jr.

Tire & Oil Co., 25 N.C. App. 601, 214 S.E.2d 222 (1975).

**No Appeal from Denial of Motion Which Fails to State Grounds.** — If the court denies a motion for a directed verdict which fails to state the specific grounds for the motion, the moving party may not complain of the denial on appeal. Pergerson v. Williams, 9 N.C. 512, 176 S.E.2d 885 (1970).

An appellant, who fails to state "specific grounds," is not entitled upon appeal to question the insufficiency of the evidence to support the verdict. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

An appellant who fails to state specific grounds for his motion for a directed verdict is not entitled, on appeal from the court's refusal to allow the motion, to question the insufficiency of the evidence to support the verdict. Builders Supplies Co. v. Gainey, 10 N.C. App. 364, 178 S.E.2d 794, cert. denied, 278 N.C. 300, 180 S.E.2d 128 (1971).

The defendant, having failed to state "specific grounds," is not entitled upon appeal to question the insufficiency of the evidence to support the verdict. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Nor from Granting of Motion where Such Failure Not Objected to.** — If the court grants a motion for a directed verdict which fails to state the specific grounds for the motion, the adverse party who did not object to failure of the motion to state specific grounds therefor cannot raise such objection in the appellate court. Pergerson v. Williams, 9 N.C. 512, 176 S.E.2d 885 (1970).

If a motion for a directed verdict is granted, the adverse party who did not object at trial to the failure of the motion to state specific grounds therefor cannot raise the objection on appeal. Builders Supplies Co. v. Gainey, 10 N.C. App. 364, 178 S.E.2d 794, cert. denied, 278 N.C. 300, 180 S.E.2d 128 (1971).

**Nor from Denying of Motion Following Mistrial.** — An order denying motion for directed verdict following a mistrial is not appealable based on the reasoning that such orders are interlocutory and do not affect a substantial right of the movant. Samia v. A.J. Ballard, Jr. Tire & Oil Co., 25 N.C. App. 601, 214 S.E.2d 222 (1975).

**Method of Complying with Requirement to State Grounds.** — A motion for a directed verdict, "citing the case of Blake v. Mallard, decided by Justice Sharp in 1964," is certainly not an approved method of complying with the requirement that "a motion for a directed verdict shall state the specific grounds therefor." Grant v. Greene, 11 N.C. App. 537, 181 S.E.2d 770 (1971).

**Grounds Should Be Included in Record on Appeal.** — Litigants would be well advised to include in the record the specific grounds stated in the motion for a directed verdict. A failure to do so could result in a dismissal of the appeal. Davis v. Peacock, 10 N.C. App. 256, 178 S.E.2d 133 (1970), cert. denied, 277 N.C. 725, 178 S.E.2d 832 (1971).

**Failure to Renew Motion Following Opponent's Additional Evidence.** — Where a defendant failed to renew a motion for a directed verdict following a plaintiff's additional evidence, the Court of Appeals will not pass upon the sufficiency of the evidence to survive a motion for a directed verdict. Gragg v. Burns, 9 N.C. App. 240, 175 S.E.2d 774 (1970).

**Plaintiff Waives Objection to Nonsuit of Codefendant.** — A plaintiff may himself call a defendant as his own witness, and may not complain if he fails to do so and the case against one defendant is nonsuited prior to the presentation of evidence by a codefendant. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**Appellate Court's Determination of Sufficiency of Evidence to Withstand Motion.** — On appeal from the granting of a defendant's motion for a directed verdict under this rule, the court must determine the sufficiency of plaintiff's evidence guided by the same principles applicable in determining the sufficiency of evidence to withstand the motion for nonsuit under former § 1-183. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971); Byrd v. Potts, 12 N.C. App. 262, 182 S.E.2d 837 (1971).

On appeal from the granting of a motion for directed verdict against the plaintiff, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. Adler v. Lumber Mut. Fire Ins. Co., 10 N.C. App. 720, 179 S.E.2d 786, aff'd, 280 N.C. 146, 185 S.E.2d 144 (1971).

In determining the sufficiency of the evidence the Court of Appeals is guided by the same principles that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under former § 1-183. All evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970); Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

In considering the sufficiency of the evidence to withstand a motion for directed verdict, the appellate court must consider the evidence in the light most favorable to the nonmoving party. Wilson v. Bob Robinson's Auto Serv., Inc., 20 N.C. App. 47, 200 S.E.2d 393 (1973).

**Appellate Court Must Look to Evidence.** — To pass upon the single question of law presented, namely, the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, the appellate court must look to the evidence and base decision thereon without regard to the trial court's "findings of fact" and "conclusions of law." Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

All relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment as of nonsuit. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

**Upon deciding that the trial court should have granted appellant's motion for a directed verdict** made at the close of all the evidence, the Court of Appeals may appropriately direct entry of judgment in accordance with the appellant's motion, but only when the appellant also in apt time moved for judgment notwithstanding the verdict. Nichols v. C.J. Moss Real Estate, Inc., 10 N.C. App. 66, 177 S.E.2d 750 (1970).

**When Supreme Court May Not Direct Entry of Judgment.** — Where the defendant made no post-verdict motion and where the trial judge after verdict did not of his own motion consider whether a directed verdict should have been entered, the Supreme Court may not direct entry of judgment in accordance with the motion by reason of the express terms of section (b)(2) of this rule. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**Section (b)(2) has no counterpart in federal Rule 50(b).** Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

**Section (b) authorizes a "reserved directed verdict" motion practice.** Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

If the judge denies, or simply does not grant, a motion for directed verdict made at the conclusion of all the evidence and a verdict is then either not returned or returned against the movant, the judge may then entertain a motion by him for judgment "in accordance with his motion for directed verdict." Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

**When Motion May Be Granted.** — See Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

**Denial of a motion for a directed verdict is not a bar to a motion for judgment notwithstanding the verdict.** Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972).

**What Is Motion for Judgment N.O.V.** — The motion for judgment n.o.v. is that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury. Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974); Kaperonis v. Underwriters at Lloyd's, London, 25 N.C. App. 119, 212 S.E.2d 532 (1975).

**The availability of a motion for a judgment notwithstanding the verdict constitutes an innovation** in the civil procedure of this State. Formerly, a motion for nonsuit made under the provisions of former § 1-183 could not be allowed after verdict for insufficiency of the evidence. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

**Motion for judgment n.o.v. is inappropriate when addressed to the trier of fact,** since it must be preceded by a motion for a directed verdict, which is improper in nonjury trials. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

**Appropriate Motion for Directed Verdict Is Prerequisite to Motion for Judgment Notwithstanding Verdict.** — The language of this rule is almost identical to the language of Rule 50, Federal Rules of Civil Procedure. The well-recognized interpretation of this rule is that the making of an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment notwithstanding the verdict. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

Where a party failed to move for a directed verdict at the close of all the evidence, the motion for judgment notwithstanding the verdict did not meet the requirement of section (b)(1) that a motion for judgment notwithstanding the verdict be supported by a timely motion for directed verdict. Dean v. Nash, 12 N.C. App. 661, 184 S.E.2d 521 (1971).

The language of section (b)(1) presupposes that its provisions are applicable only to situations in which the party moving for a directed verdict has his motion denied and the verdict of the jury is adverse to his position. Hathcock v. Lowder, 16 N.C. App. 255, 192 S.E.2d 124, cert. denied, 282 N.C. 426, 192 S.E.2d 836 (1972).

The reservation of final ruling on a motion for a directed verdict affords the basis for the post-verdict motion for judgment notwithstanding the verdict. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Motion for judgment n.o.v. must be preceded by a motion for a directed verdict. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

A motion for judgment n.o.v. may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence. Gibbs v. Duke, 32 N.C. App. 439, 232 S.E.2d 484 (1977).

A motion for judgment non obstante verdicto does not meet the requirements of section (b)(1) unless the moving party previously moved for a directed verdict at the close of all the evidence. Gibbs v. Duke, 32 N.C. App. 439, 232 S.E.2d 484 (1977).

**And Motion for Directed Verdict after Jury Has Returned Verdict Is Too Late.** — A litigant's motion for directed verdict nunc pro tunc, which is made after the jury has returned its verdict in a case, comes too late to preserve its right to move for judgment notwithstanding the verdict; therefore, a litigant's purported motion for judgment n.o.v. is then properly denied. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

This rule provides for a motion for a directed verdict at the close of plaintiff's evidence or at the close of all the evidence. It does not give a litigant the option of waiting until after the verdict is in to make the motion for a directed verdict to attempt to preserve his right to move for judgment notwithstanding the verdict. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

Procedure whereby the trial judge withheld his ruling on a motion for a directed verdict until after the jury had returned its verdict was disapproved. Hamel v. Young Spring & Wire Corp., 12 N.C. App. 199, 182 S.E.2d 839, cert. denied, 279 N.C. 511, 183 S.E.2d 687 (1971).

After a case has been submitted to a jury, the proper motion to be ruled upon at that time is a motion for judgment notwithstanding the verdict. Hamel v. Young Spring & Wire Corp., 12 N.C. App. 199, 182 S.E.2d 839, cert. denied, 279 N.C. 511, 183 S.E.2d 687 (1971).

**Motion Addressed to Discretion of Trial Court.** — A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

**Motion Is Cautiously Granted.** — A motion for judgment notwithstanding the verdict is cautiously and sparingly granted. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972).

**Standards for Determination of Judgment Notwithstanding Verdict.** — The same test is to be applied on a motion under section (b)(1) for judgment notwithstanding the verdict as is applied on a motion under section (a) for a directed verdict. Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872, cert. denied, 279 N.C. 727, 184 S.E.2d 886 (1971).

In determining the sufficiency of the evidence upon a motion for judgment notwithstanding the verdict, the courts are guided by the same principles that prevailed under former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit. Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872, cert. denied, 279 N.C. 727, 184 S.E.2d 886 (1971).

The standards for granting on a motion for judgment notwithstanding the verdict are the same as those for granting a directed verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Kaperonis v. Underwriters at Lloyd's, London, 25 N.C. App. 119, 212 S.E.2d 532 (1975).

The same standard of sufficiency of evidence as that under the directed verdict motion is applied. Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

When passing on a motion for judgment notwithstanding the verdict, the same standards applicable to a motion for directed verdict are to be applied. Thus, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict for plaintiff. Brokers, Inc. v. High Point City Bd. of Educ., 33 N.C. App. 24, 234 S.E.2d 56 (1977).

**Sufficiency of Evidence Is Questioned upon Motion for Judgment Non Obstante Veredicto.** — Upon a motion for judgment non obstante veredicto, the sufficiency of the evidence upon which the jury based its verdict is drawn into question. Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

A motion for judgment notwithstanding the verdict permits the judge to consider the sufficiency of the evidence after the jury has returned a verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972).

**And Evidence of Party Opposing Motion Must Be Taken as True.** — Upon defendant's motion for judgment non obstante veredicto all the evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); Dickinson v. Pake, 19 N.C. App. 287, 198 S.E.2d 467 (1973), rev'd on other grounds, 284 N.C. 576, 201 S.E.2d 897 (1974); Wilson v. Miller, 20 N.C. App. 156, 201 S.E.2d 55 (1973).

All of the evidence which supports the claim of the party opposing the motion must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

Insofar as the defendant's testimony creates a conflict in his testimony, it must be resolved in his favor in passing on the plaintiff's motion for judgment notwithstanding the verdict. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

When passing on a motion for judgment notwithstanding the verdict, the court must view the evidence in the light most favorable to the nonmovant. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Kaperonis v. Underwriters at Lloyd's, London, 25 N.C. App. 119, 212 S.E.2d 532 (1975).

**Trial Judge Not Required to Take Testimony of Witness at Face Value.** — In passing upon a motion to set aside a verdict as being against the greater weight of the evidence, the trial judge is not required to take the testimony of any witness at face value; if at any time he is convinced that the jury has been misled by unreliable testimony into returning an erroneous verdict, his is the responsibility for awarding a new trial for that reason. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973).

**Granting Judgment Notwithstanding Verdict Is Error if Case was Sufficient to Go to Jury.** — If the plaintiffs have made out a case sufficient to go to the jury, then it is error to enter the judgment setting aside the verdict and granting a judgment for the defendant notwithstanding the verdict. Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970).

**Granting of Motion Is Adjudication on the Merits.** — The granting of a motion for judgment notwithstanding the verdict constitutes an adjudication on the merits of a case. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

**Motion Preserves Exceptions to Denial of Directed Verdict.** — By proceeding after verdict under section (b)(1) with motion for judgment notwithstanding the verdict, a party preserves for appellate review his exceptions to the denial of his motion for directed verdict made at the close of all the evidence. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

**No Review unless Abuse Shown.** — The trial court's ruling on a motion to set aside the verdict as being contrary to the weight of the evidence will not be reviewed in the absence of a showing of abuse. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

**The appellate court may reverse the grant of judgment n.o.v.** — Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

**If it does this and nothing more,** the new trial proceeds upon remand. Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

**But the appellate court may also reverse on the grant of new trial,** in which event the judgment of the verdict winner must be reinstated. Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

**Failure to Move for New Trial Requires Reinstatement of Verdict.** — Where a judgment entered for defendant notwithstanding the verdict was reversed, and defendant had not moved in the alternative for a new trial pursuant to section (c)(1), it was ordered that the jury verdict be reinstated and that judgment be entered thereon. Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872, cert. denied, 279 N.C. 727, 184 S.E.2d 886 (1971).

**Trial Judge Must Rule on Alternative Motion for New Trial.** — Where defendant makes a motion for judgment notwithstanding the verdict and joins with this motion an alternative motion for a new trial, in granting the motion for judgment notwithstanding the verdict, the trial judge should also rule on the alternative motion for a new trial. Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

**And a party must appeal conditionally from an adverse ruling thereon.** Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

**Denial of a motion in the alternative for a new trial lies within the discretion of the trial judge,** and an action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

**Applied** in Pompey v. Hyder, 9 N.C. App. 30, 175 S.E.2d 319 (1970); Stewart v. Nation-Wide Check Corp., 9 N.C. App. 172, 175 S.E.2d 615 (1970); Hull v. Winn-Dixie Greenville, Inc., 9 N.C. App. 234, 175 S.E.2d 607 (1970); Allied Concord Fin. Corp. v. Lane, 9 N.C. App. 329, 176 S.E.2d 36 (1970); Thomas v. Nationwide Mut. Ins. Co., 277 N.C. 329, 177 S.E.2d 286 (1970); Continental Ins. Co. v. Foard, 9 N.C. App. 630, 177 S.E.2d 431 (1970); Walker v. Pless, 11 N.C. App. 198, 180 S.E.2d 471 (1971); King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971); Johnson v. George Tenuta & Co., 13 N.C. App. 375, 185 S.E.2d 732 (1972); Wyche v. Alexander, 15 N.C. App. 130, 189 S.E.2d 608 (1972); Johnson v. City of Winston-Salem, 15 N.C. App. 400, 190 S.E.2d 342 (1972); Dawkins v. Benton, 16 N.C. App. 58, 190 S.E.2d 853 (1972); McArver v. Pound & Moore, Inc., 17 N.C. App. 87, 193 S.E.2d 360 (1972); Thomas v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 17 N.C. App. 125, 193 S.E.2d 312 (1972); Winters v. Burch, 17 N.C. App. 660, 195 S.E.2d 343 (1973); Clouse v. Chairtown Motors, Inc., 17 N.C. App. 669, 195 S.E.2d 327 (1973); Samples v. Maxson-Betts Co., 18 N.C. App. 359, 197 S.E.2d 71 (1973); Floyd v. Jarrell, 18 N.C. App. 418, 197

S.E.2d 229 (1973); Picklesimer v. Robbins, 19 N.C. App. 280, 198 S.E.2d 443 (1973); Kinlaw v. Tyndall, 19 N.C. App. 669, 199 S.E.2d 698 (1973); Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974); Lea v. Dudley, 20 N.C. App. 702, 202 S.E.2d 799 (1974); Arnold v. Merchants Distribs., Inc., 21 N.C. App. 579, 205 S.E.2d 792 (1974); Norris v. Rowan Mem. Hosp., 21 N.C. App. 623, 205 S.E.2d 345 (1974); Williams v. Canal Ins. Co., 21 N.C. App. 658, 205 S.E.2d 331 (1974); Shaw v. Rose's Stores, Inc., 22 N.C. App. 140, 205 S.E.2d 789 (1974); Ballance v. Wentz, 286 N.C. 294, 210 S.E.2d 390 (1974); In re Will of Mucci, 287 N.C. 26, 213 S.E.2d 207 (1975); Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809 (1975); Huffman v. Gulf Oil Corp., 26 N.C. App. 376, 216 S.E.2d 383 (1975); Hoffman v. Clement Bros. Co., 27 N.C. App. 548, 219 S.E.2d 638 (1975); Foster v. Shearin, 28 N.C. App. 51, 220 S.E.2d 179 (1975); Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976); Bynum v. North Carolina Blue Cross & Blue Shield, Inc., 28 N.C. App. 515, 222 S.E.2d 263 (1976); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976); Dize Awning & Tent Co. v. City of Winston-Salem, 29 N.C. App. 297, 224 S.E.2d 257 (1976); Gray v. Gray, 30 N.C. App. 205, 226 S.E.2d 417 (1976); Mosley v. Perpetual Sav. & Loan Ass'n, 30 N.C. App. 522, 227 S.E.2d 163 (1976); Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977); Snider v. Dickens, 32 N.C. App. 388, 232 S.E.2d 289 (1977).

**Cited** in Perry v. Suggs, 9 N.C. App. 128, 175 S.E.2d 696 (1970); Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970); Samons v. Meymandi, 9 N.C. 490, 177 S.E.2d 209 (1970); Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970); Southern Ry. v. Hutton & Bourbonnais Co., 10 N.C. App. 1, 177 S.E.2d 901 (1970); Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971); Hobson Constr. Co. v. Holiday Inns, Inc., 14 N.C. App. 475, 188 S.E.2d 617 (1972); Lewis v. Piggott, 16 N.C. App. 395, 192 S.E.2d 128 (1972); Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Ayers v. Tomrich Corp., 17 N.C. App. 263, 193 S.E.2d 764 (1973); Shanahan v. Shelby Mut. Ins. Co., 19 N.C. App. 143, 198 S.E.2d 47 (1973); Burlington Indus., Inc. v. Foil, 19 N.C. App. 172, 198 S.E.2d 194 (1973); Fleming Produce Corp. v. Covington Diesel, Inc., 21 N.C. App. 313, 204 S.E.2d 232 (1974); Foy v. Bremson, 286 N.C. 108, 209 S.E.2d 439 (1974); Chavis v. Reynolds, 22 N.C. App. 734, 207 S.E.2d 396 (1974); Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Smith v. Garrett, 32 N.C. App. 108, 230 S.E.2d 775 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Peeler v. Southern Ry., 32 N.C. App. 759, 233 S.E.2d 685 (1977).

## Rule 51. Instructions to jury.

**Editor's Note.** — For comment on the North Carolina jury charge, present practice and future proposals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

**For note on judges' remarks in the absence of** a jury as a violation of § 1-180, see 13 Wake Forest L. Rev. 259 (1977).

**This rule requires the trial judge to perform two positive acts:** (1) to declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973); Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

**Requirement of Former § 1-180 Continued by This Rule.** — The requirement of this rule that the judge "shall declare and explain the law arising on the evidence given in the case," is a continuation of the requirement previously contained in former § 1-180. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

The provisions of section (a) are identical to those of § 1-180 which formerly governed the trial of civil cases as well as criminal cases. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

**Section 1-180 is now applicable only to criminal cases.** Civil cases are governed by section (a) of this rule, which incorporates the substance of the section. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

**Prohibition of Section (a).** — The prohibition provided by § 1-180 in criminal cases and section (a) of this rule in civil cases does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of an opinion as to what has or has not been shown by the testimony. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

**The chief purpose of a charge is to aid the jury** to understand clearly the case and arrive at a correct verdict. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

The chief purpose of a charge is to aid the jury in clearly understanding the case and in arriving at a correct verdict. Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976).

In applying the law to the evidence the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

**Thus, section (a) of this rule confers a substantial legal right.** Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

This rule confers a substantial legal right. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972); Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

**And Imposes Positive Duty on Trial Judge.** — Section (a) of this rule imposes upon the trial judge a positive duty. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

**Judge May Not Convey His Opinion of Evidence.** — A trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

Trial court's instruction, "I will not attempt to recall all of the evidence, but only so much of it as the court deems is important when you come to consider your verdict," was erroneous as an expression of opinion on the importance of the recapitulated evidence. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Under section (a) of this rule the trial judge may not express an opinion, either directly or by implication, in favor of any party at any stage of the trial. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974).

**In Any Manner at Any Stage of Trial.** — While this rule refers to the judge's charge, nevertheless, the admonition has always been construed to forbid the judge to convey to the jury in any manner at any stage of the trial his opinion on the facts in evidence. State Hwy. Comm'n v. Ferry, 19 N.C. App. 332, 198 S.E.2d 773 (1973).

**Probable Effect on Jury Is Test of Impairment.** — The trial judge occupies an exalted station, causing jurors to entertain great respect for his opinion and to be influenced easily by a suggestion coming from him. The probable effect upon the jury, and not the motive of the judge, determines whether a party's right to a fair trial has been impaired. In re Will of York, 18 N.C. App. 425, 197 S.E.2d 19, cert. denied, 283 N.C. 753, 198 S.E.2d 729 (1973).

**Judge Must Declare and Explain Law Arising on the Evidence.** — It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971).

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

The duty of the judge is to declare the law arising on the evidence and to explain the application of the law thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

Section (a) of this rule requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

Where the jury is given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative, the trial judge has failed to comply with the mandate of section (a) of this rule. American Credit Co. v. Brown, 10 N.C. App. 382, 178 S.E.2d 649 (1971).

It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972).

This rule imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case; a mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to satisfy the requirements of this rule. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

The provisions of this rule require that the trial judge in his charge to the jury shall declare and explain the law arising on the evidence in the case, and unless this mandatory provision of the statute is observed, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Where the question whether time was of the essence of the contract between the parties was a substantial feature of a case, the trial judge was required, without a request, to declare and explain the law with respect thereto. Gelder & Associates, Inc. v. Continental Ins. Co., 15 N.C. App. 686, 190 S.E.2d 674 (1972).

In every case the court has the duty to instruct the jury correctly on all substantive features of the case. Duke v. Mutual Life Ins. Co., 22 N.C. App. 392, 206 S.E.2d 796, rev'd on other grounds, 286 N.C. 244, 210 S.E.2d 187 (1974).

The law must be declared, explained and applied to the evidence bearing on the substantial and essential features of a case. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. He must relate and apply the law to variant factual situations presented by some reasonable view of the evidence. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

By alleging the existence of a pertinent city ordinance, introducing it in evidence and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

**The trial judge is not required to review all of the evidence.** Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

The judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Where the court reviews in detail evidence of plaintiff's injuries, the failure of the court to repeat such evidence in enunciating the rule for the admeasurement of damages for personal injury is not error. Love v. Hunt, 17 N.C. App. 673, 195 S.E.2d 135 (1973).

**But he must summarize it sufficiently** to permit him to explain the application of the law thereto. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

**Charge Containing General Explanation Only.** — A charge which contains a general explanation of the law but fails to apply the law to the evidence given in the case then being tried is insufficient. Campbell v. Campbell, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

Charge given by trial court that merely recapitulated the evidence, stated the parties' contentions and recited certain general principles of contract law will not suffice. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

A statement of the contentions of the parties together with a bare declaration of the law in general terms is not sufficient. Jones v. Bess, 26 N.C. App. 1, 214 S.E.2d 599 (1975).

**When the court's statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses** in any particular respect, it is the duty of counsel to call attention thereto and request a correction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

**An inadvertence by the court in recapitulating the evidence** will not be grounds for reversible error unless it is called to the attention of the court in time for correction. Sims v. Virginia Homes Mfg. Corp., 32 N.C. App. 193, 231 S.E.2d 287 (1977).

**That some of the language of the complaint was used in declaring the law of the case** is not error so long as the judge explains all the law arising from the evidence as was done in this case. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

**The trial judge's failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error.** Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

In a personal injury action arising out of a collision it is error for the court to fail to instruct the jury what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of plaintiff's contributory negligence. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The trial court, by failing properly to declare and explain the law arising on the evidence, committed prejudicial error entitling defendant to a new trial. Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971).

The failure of the court to explain the law and to apply it to the evidence on all substantial features of the case constitutes prejudicial error for which the aggrieved party is entitled to a new trial. Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972).

Where the judge failed to explain to the jury what bearing their findings as to the facts would have on the issue of defendant's negligence and the instructions gave the jury unlimited authority to find the defendant generally negligent for any reason the evidence might suggest to them, there was error. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

**And this is true even without prayer for special instructions.** Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

This rule imposes upon the judge a duty to explain the law and to apply it to the evidence on all substantial features of the case, even without a request for special instructions. Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976).

**Such Failure Requires New Trial Regardless of Lack of Objection.** — Although defendant's trial counsel made no objection to the form of the issues which were submitted to the jury, defendant was entitled to have the issues decided by the jury under a charge from the court which correctly declared and explained the law arising on the evidence; thus, for errors there must be a new trial. Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971).

**But Party Must Request Instructions on Subordinate Features of Case.** — Where the court adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence, the charge is sufficient and will not be held error for failure of the court to give instructions on subordinate features of the case, since it is the duty of a party desiring instructions on a subordinate feature, or greater elaboration, to aptly tender a request therefor. Koutsis v. Waddel, 10 N.C. App. 731, 179 S.E.2d 797 (1971).

If a more thorough or more detailed charge is desired it is incumbent upon the party deserving elaboration to request it. Prevette v. Bullis, 12 N.C. App. 552, 183 S.E.2d 810 (1971).

Where the court has charged adequately on the material aspects of the case arising on the evidence and has fairly applied the law to the factual situation, the charge will not be held error for failure of the court to instruct on subordinate features absent a request. Hudson v. Hudson, 21 N.C. App. 412, 204 S.E.2d 697 (1974).

When the court has sufficiently instructed the jury, if the instructions are not as full as a party desires, he should submit a request for special instructions. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525 (1974).

**When a party aptly tenders a written request for a specific instruction** which is correct in itself and supported by the evidence, the failure of the court to give the instruction, at least in substance, is error. Faeber v. E. C. T. Corp., 16 N.C. App. 429, 192 S.E.2d 1 (1972).

**Use of Exact Words Formulated by Litigant.** — A litigant is not entitled to have the trial judge instruct the jury in the exact words formulated by the litigant, it being sufficient if the pertinent and applicable instructions requested are given substantially in the charge. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

**Broadside Assignment to Charge Ineffective.** — A broadside assignment of error to the charge as a whole is ineffective to bring up any portion of the charge for review. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972).

**Cumulative Effect of Errors May Be Prejudicial.** — Where any one of the errors might not have been sufficiently prejudicial to justify a new trial, the cumulative effect of the errors was sufficiently prejudicial to warrant the granting of a new trial. Dean v. Nash, 12 N.C. App. 661, 184 S.E.2d 521 (1971).

**New Trial Where Instruction Is Erroneous to Prejudice of Appellant.** — Although it is a correct rule that where there is no evidence in the record on appeal the trial court's charge will be sustained, it is also true that where an instruction is patently or inherently erroneous to the prejudice of the appellant, the judgment will be reversed for new trial. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973).

**Determining Whether Prejudice Resulted from Trial Judge's Remarks.** — Whether prejudice resulted from the trial judge's remarks is to be determined from the circumstances under which the remarks were made and the probable meaning of the language of the judge to the jury. Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972).

**The jury charge must be considered contextually as a whole,** and when so considered if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception that the instruction might have been better stated will not be sustained. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

**But erroneous instructions on burden of proof are not cured by contextual**

**construction.** Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

**Conflicting instructions on a material aspect of the case** must be held prejudicial error since it cannot be determined that the jury was not influenced by the incorrect portion of the charge. Cross v. Beckwith, 16 N.C. App. 361, 192 S.E.2d 64 (1972).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted because it will not be assumed that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

**The judge is not required to declare and explain the law on a set of hypothetical facts.** Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**It is error for the trial court to charge the jury upon an abstract principle of law** which is not presented by the allegations and evidence. Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

**Use of Illustrations in Explaining Legal Principles.** — In explaining legal principles to a lay jury the trial judge's use of illustrations should be carefully guarded to avoid suggestions susceptible of inferences as to the facts beyond that intended. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

New trials have been awarded where illustrations or hypothetical references were deemed to constitute prejudicial error. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**When two or more defendants are jointly charged with a crime,** a charge which can be construed to mean that the jury must convict all if it finds one guilty constitutes reversible error. State v. Mitchell, 20 N.C. App. 437, 201 S.E.2d 720 (1974).

**Failure of trial judge to include not guilty by reason of self-defense** as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

**Statement of Contentions of the Parties.** — The trial court is not required to state the contentions of the parties, but when it undertakes to state the contentions of one party upon a particular phase of the case, it is incumbent upon the court to give the opposing contentions of the adverse party upon the same aspect. Comer v. Cain, 8 N.C. App. 670, 175 S.E.2d 337 (1970).

It is not required that the statement of contentions of the parties as stated by the court be of equal length. Comer v. Cain, 8 N.C. App. 670, 174 S.E.2d 337 (1970).

Section (a) of this rule requires that the judge give equal stress to the contentions of the various parties in recapitulating the evidence presented at the trial. He may not set forth one side's evidence fully and in detail while briefly glancing over the evidence produced by the other party. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974).

**Facts Not Supported by Evidence.** — An instruction relating to a factual situation not properly supported by the evidence is erroneous. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

**Assumption of Facts Not in Evidence.** — Where the instructions of the court are based upon an assumption of facts which are not in evidence, they must be held for error. Clark v. Barber, 20 N.C. App. 603, 202 S.E.2d 347 (1974).

**When the evidence is susceptible of several interpretations** a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

**No Error in Failure to Instruct as to Contention Not Supported by Evidence.** — There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

**Emphasizing Evidence of One Side.** — The trial judge in an armed robbery case erred in emphasizing the State's evidence and minimizing defendant's evidence where he gave a complete recitation of the testimony of the State's witnesses but referred to the testimony of defendant and his six witnesses only by stating that defendant contended he was elsewhere at the time of the robbery. State v. Foster, 27 N.C. App. 409, 219 S.E.2d 265 (1975).

**Defining Negligence and Proximate Cause.** — The trial judge commits error in the charge when he fails to properly define negligence or proximate cause and fails to even mention foreseeability as a requisite of proximate cause. Ford v. Marshall, 16 N.C. App. 179, 191 S.E.2d 378 (1972).

Where trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence, the contentions of the parties, and instructed as to measure of damages, but failed to instruct the jury as to what facts if found by them to be true would constitute negligence, it was reversible error. Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

**Instructions on elements of damages** are not proper if the evidence does not reveal a basis for such an award. Spears v. Service Distrib. Co., 27 N.C. App. 646, 219 S.E.2d 817 (1975).

**Charge as to Burden of Proof.** — Where, at the beginning of its charge, the court said "And, as to each issue, I'll tell you which party has the burden of proof," but only as to one issue did the court do this, new trial will be granted. Foy v. Bremson, 20 N.C. App. 440, 201 S.E.2d 708, modified on other grounds, 286 N.C. 108, 209 S.E.2d 439 (1974).

**Where in his charge the court used the phrases "as I understand it" and "I think he meant"** in referring to his own understanding of certain testimony, but he cautioned the jury not to take the facts or evidence from the court but only from their own recollection of the evidence, the court was simply interpreting and summarizing the evidence in order to declare and explain the law arising thereon as required by section (a) of this rule. State v. Shelton, 20 N.C. App. 644, 202 S.E.2d 292 (1974).

**Emphasis on Type of Witnesses Appearing for Plaintiff.** — Where, in the court's charge to the jury in a condemnation case, there was an emphasis placed upon the type of witnesses appearing on behalf of the Board of Transportation, as contrasted to the laymen who testified on behalf of the landowners, the court erred in its charge. State Hwy. Comm'n v. Ferry, 19 N.C. App. 332, 198 S.E.2d 773 (1973).

**The credibility of the witnesses and conflicts in the evidence are for the jury**, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**And Failure to Permit Jury to Pass upon Credibility Is Prejudicial Error.** — The burden of proof on the issue of damages was on the plaintiff, and it was prejudicial error to fail to permit the jury to pass upon the credibility of the evidence. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

The vice in the judge's instruction to the jury that it should find damages "in the amount of $507, there being no evidence to the contrary as to the amount," was that the jury was not permitted to pass upon the credibility of the evidence. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**A peremptory instruction does not deprive the jury of its right to reject the evidence** because of lack of faith in its credibility. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**Peremptory Instruction Not Abolished.** — The new Rules of Civil Procedure have not abolished peremptory instructions in proper cases. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**When Peremptory Instruction May Be Given.** — When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**The correct form of a peremptory instruction** is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**Remarks Discrediting Counsel.** — Remarks by the trial judge whose effect was to threaten to find defendants' counsel in contempt of court tended to discredit defendants' counsel, and hence their cause, in the eyes of the jury in violation of section (a) of this rule. Board of Transp. v. Wilder, 28 N.C. App. 105, 220 S.E.2d 183 (1975).

**Judge May Not Comment to Discredit Litigant.** — The trial judge must abstain from conduct or language which tends to discredit or prejudice a litigant or his cause with the jury. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

The content, tenor, frequency of remarks, and the persistence on the part of the trial judge may portray an antagonistic attitude toward the defense and convey to the jury the impression of judicial leaning prohibited by this rule. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

**Criterion of Improper Comment.** — The criterion for determining whether the trial judge deprived a litigant of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

**Applied** in Hoffman v. Brown, 9 N.C. App. 36, 175 S.E.2d 388 (1970); Peterson v. Taylor, 10 N.C. App. 297, 178 S.E.2d 227 (1971); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); Slocumb v. Metts, 12 N.C. App. 43, 182 S.E.2d 12 (1971); Spinella v. Pearce, 12 N.C. App. 121, 182 S.E.2d 620 (1971); Jernigan v. Atlantic Coast Line R.R., 12 N.C. App. 241, 182 S.E.2d 847 (1971); Freeman v. Hamilton, 14 N.C. App. 142, 187 S.E.2d 485 (1972); Bank of N.C. v. Barry, 14 N.C. App. 169, 187 S.E.2d 478 (1972); Braswell v. Purser, 16 N.C. App. 14, 190 S.E.2d 857 (1972), aff'd, 282 N.C. 388, 193 S.E.2d 90 (1972); In re Will of Holland, 16 N.C. App. 398, 192 S.E.2d 98 (1972); Chance v. Jackson, 17 N.C. App. 638, 195 S.E.2d 321 (1973); Clouse v. Chairtown Motors, Inc., 17 N.C. App. 669, 195 S.E.2d 327 (1973); McIntosh v. McIntosh, 20 N.C. App. 742, 202 S.E.2d 804 (1974); Wyatt v. Haywood, 22 N.C. App. 267, 206 S.E.2d 260 (1974); Lawson v. Walker, 22 N.C. App. 295, 206 S.E.2d 325 (1974); Frazier v. Glasgow, 24 N.C. App. 641, 211 S.E.2d 852 (1975); Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975); Lee v. Kellenberger, 28 N.C. App. 56, 220 S.E.2d 140 (1975); Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975); Lentz v. Gardin, 30 N.C. App. 379, 226 S.E.2d 839 (1976); Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

**Stated** in McLamb v. Brown Constr. Co., 10 N.C. App. 688, 179 S.E.2d 895 (1971).

**Cited** in Town of Mars Hill v. Honeycutt, 32 N.C. App. 249, 232 S.E.2d 209 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); In re Johnson, 32 N.C. App. 704, 233 S.E.2d 643 (1977).

## Rule 52. Findings by the court.

**Editor's Note.** —

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

**Applicability of Rule.** — Where the judgment was based upon the consent of the parties, this rule is not applicable. Haddock v. Waters, 19 N.C. App. 81, 198 S.E.2d 21 (1973).

**Difference between this rule and the federal rule** is that federal Rule 52(a) specifically requires that in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975).

Section (c) of this rule is nearly identical to the federal Rule 52(b) and the court may therefore turn to the federal courts' interpretation of that rule for guidance. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

**Findings of Fact and Conclusions of Law Are Essential.** — Under the rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision-making process. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

Where the judge tries a case without a jury, it is his duty to find the facts specially and state separately his conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence. Heating & Air Conditioning Assocs. v. Myerly, 29 N.C. App. 85, 223 S.E.2d 545, appeal dismissed, 290 N.C. 94, 225 S.E.2d 323 (1976).

**Reason for Finding of Facts and Conclusions of Law.** — The necessity for the finding of facts and entry thereof, and for the conclusions of law to be drawn from the facts, is to allow review by the appellate courts. Without such findings and conclusions, it cannot be determined whether or not the judge correctly found the facts or applied the law thereto. Jones v. Murdock, 20 N.C. App. 746, 203 S.E.2d 102 (1974).

The requirement for appropriate findings of fact and conclusions of law is not designed to encourage ritualistic recitations by the trial court. The requirement is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Without such findings and conclusions, it cannot be determined whether or not the judge correctly found the facts or applied the law thereto. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

**The judge who tries, etc.** —

In accord with 2nd paragraph in original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

In cases in which the trial court passes on the facts, the court is required to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

In all actions tried without a jury it is the duty of the trial judge to find the facts specially, state separately its conclusions of law, and enter the appropriate judgment. It is also the duty of the trial judge to make findings of fact determinative of the issues raised by the pleadings and the evidence. Conrad v. Jones, 31 N.C. App. 75, 228 S.E.2d 618 (1976).

**Duty of Judge to Consider, etc. —**

When trial by jury is waived and issues of facts are tried by the court, the trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

**Motion to Dismiss.** — The trial court is required to make findings of fact and conclusions of law on a motion to dismiss only when required by statute or requested by a party. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

On a motion to dismiss a defendant's counterclaim under Rule 41(b), where all the evidence is in, it is incumbent upon the judge to consider and weigh it all and render judgment on the merits of the claim and counterclaim in the form directed by section (a) of this rule. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

**When the trial court is not required to find facts and make conclusions of law** and does not do so, it is presumed that the court on proper evidence found facts to support its judgment. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

**The trial judge passes upon, etc. —**

In accord with original. See Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

**The trial judge determines, etc.—**

In accord with original. See Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

**Findings of fact by the court, etc. —**

Although the court allowed defendant's motion to dismiss, where it made findings of fact in its judgment as provided in this rule, based upon the evidence, concluded that plaintiffs were not entitled "to recover anything from the defendants, or either of them," and adjudged that plaintiffs recover nothing from either defendant, the effect of the court's action was to enter judgment on the merits rather than dismiss the case. Curtis v. City of Sanford, 18 N.C. App. 543, 197 S.E.2d 584 (1973).

**There are two kinds of facts, etc. —**

In accord with original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

**Ultimate facts are the final facts, etc. —**

In accord with original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

**Evidentiary facts are those, etc. —**

In accord with original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

**The trial judge is required to find, etc. —**

In accord with 1st paragraph in original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

**A "conclusion of law" is the court's statement of the law which is determinative of the matter at issue between the parties.** Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

**The conclusions of law necessary to be stated** are the conclusions which, under the facts found, are required by the law and from which the judgment is to result. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

**Separate Conclusions, etc. —**

In accord with 4th paragraph in original. See Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

When trial by jury is waived and issues of facts are tried by the court, the court is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

This rule requiring that the findings of fact be stated separately from the conclusions of law is satisfied when the separation is made in such a manner as to render the findings of fact readily distinguishable from the conclusions of law. Jackson v. Collins, 9 N.C. App. 548, 176 S.E.2d 878 (1970).

The mandate of subsection (a)(1) requires that the trial judge "find the facts specially"; and, in lieu of giving instructions to a jury relevant to issues arising upon the pleadings, that he "state separately" his conclusions of law. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

A conclusion of law must be based on the facts found by the court and must be stated separately. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

**Purpose for requiring conclusions of law to be stated separately** is to enable appellate courts to determine what law the trial court applied in directing the entry of judgment in favor of one of the parties. Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).

**Judge's Findings of Fact, etc. —**

Where facts are found by the court, if supported by competent evidence, such facts are as conclusive on appeal as the verdict of a jury. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971); Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972).

When trial by jury is waived and issues of facts are tried by the court, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

The trial court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been admitted. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been submitted. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

The trial court's findings of fact are conclusive if they are supported by competent evidence, even though there may be evidence to the contrary. Heating & Air Conditioning Assocs. v. Myerly, 29 N.C. App. 85, 223 S.E.2d 545, appeal dismissed, 290 N.C. 94, 225 S.E.2d 323 (1976).

When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there be any evidence to support the judgment. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Under section (a), the judge becomes both judge and jury, and his findings of fact have the force and effect of a jury verdict and, if supported by competent evidence, are conclusive on appeal even though the evidence might sustain findings and conclusions to the contrary. Beasley-Kelso Assocs. v. Tenney, 30 N.C. App. 708, 228 S.E.2d 620, cert. denied, 291 N.C. 323, 230 S.E.2d 675 (1976).

If supported by competent evidence, findings of fact made by the trial judge sitting without a jury are conclusive upon review in an appellate court, the weight and credibility of the evidence being for the trial judge. Waters v. Humphrey, 33 N.C. App. 185, 234 S.E.2d 462 (1977).

In a hearing before the trial judge without a jury, the findings of fact are conclusive on appeal if there is evidence to support them, even though evidence may sustain findings to the contrary. Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977).

**But Sufficiency of Evidence to Support Judge's Findings May Be Questioned on Appeal.** — The question of the sufficiency of the evidence to support the trial court's findings of fact may be raised on appeal. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

Notice of appeal and exception to the entry of a judgment after denial of motions for dismissal and judgment presents the face of the record for review including the question of whether the facts found support the judgment and whether the judgment is regular in form. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

**Court Need Not Submit Issues of Fact.** — This rule does not require or contemplate that the court submit to itself issues of fact in the manner in which issues of fact are submitted to a jury. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

Inconsistency and confusion may arise when the trial judge unnecessarily frames and answers issues in addition to finding specific facts and stating his conclusions of law with reference thereto. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

**When an action is tried upon the facts without a jury, there is no charge.** Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

**Findings Which Resolve Conflicts Are Binding.** — Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

**Judge's Findings of Fact Are Conclusive in Action for Permanent Restraining Order.** — When the purpose of the action is a permanent restraining order, the trial court's findings of fact are binding on appeal, if supported by the evidence. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**But Not in Action Involving Temporary Restraining Order.** — In cases involving a temporary rather than a permanent restraining order, the court's findings of fact are not binding on the appellate court which may make its own findings. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**The posing and answering of issues by the court** when it sits without a jury is not approved. Gibson v. Jones, 7 N.C. App. 534, 173 S.E.2d 57 (1970).

**Verdict on Issues, etc.** —

The entry of a verdict by the trial court, sitting without a jury, based on issues of fact answered by the court is not approved. Gibson v. Jones, 7 N.C. App. 534, 173 S.E.2d 57 (1970).

**Findings of Fact upon Application for Alimony Pendente Lite.** — The provision of section (a)(2) that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of § 50-16.8(f) that the trial judge shall make findings of fact upon an application for alimony pendente lite, since the Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of more specificity. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

This rule does not apply in awarding alimony pendente lite. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

**Issuance of Preliminary Injunction.** — There is no statute that requires the court to make findings of fact and conclusions of law in granting or denying a preliminary injunction under Rule 65. Hence, absent a request by a party that the court make findings of fact and conclusions of law, the court is required to state only the reasons for its issuance. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Failure to Except.** —

Failure to except to the findings of the trial judge does not necessarily preclude appellate review on the question of whether the evidence supported the findings of fact, but appellant must assign error so as to outline his objections on appeal. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

**Sufficient Compliance.**—

Where, instead of stating separately his conclusions of law, the trial judge answered issues of negligence and contributory negligence, these answers were treated as the equivalent of stated conclusions of law (1) that plaintiff was damaged by the negligence of defendant, and (2) that plaintiff did not by his own negligence contribute to his own damage. Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971).

The trial judge, after denying defendant's motion to dismiss, properly complied with the requirements of section (a)(1) by entering judgment in which the court found the facts specially. Higgins v. Builders & Fin., Inc., 20 N.C. App. 1, 200 S.E.2d 397, cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1973).

**Insufficient Compliance.** —

An action to enforce restrictive covenants must be remanded so that proper findings of fact can be entered based upon sufficient evidence where the record contains insufficient evidence to support all of the proper findings of fact, and the facts found do not support the conclusions of law and the judgment. Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972).

The mere assertion that "plaintiff is not entitled to the relief prayed for by her," without stating the grounds for such a bare legal conclusion, does not comply with the requirements of subsection (a)(1). Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).

**Stipulations Insufficient to Support Findings.** — Where there was no evidence introduced, and the stipulations are insufficient to support all of the necessary findings of fact, it is necessary that this case be remanded so that proper findings of fact can be entered based upon sufficient evidence. Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972).

**Oral Statements on Issues Constituted neither Findings nor Verdict.** — Where, at the conclusion of the evidence in an action tried before the court without a jury, the trial judge orally indicated answers in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial, and instructed plaintiff's counsel to submit a proposed judgment containing appropriate findings of fact and conclusions of law, the issues and the court's answers thereto constituted neither a verdict nor findings of fact and conclusions of law which would permit a substitute judge to proceed under Rule 63 to enter judgment in the case. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

**Applied** in Perry v. Suggs, 9 N.C. App. 128, 175 S.E.2d 696 (1970); Thorne v. Thorne, 10 N.C. App. 151, 178 S.E.2d 33 (1970); Ross v. Perry, 12 N.C. App. 47, 182 S.E.2d 655 (1971); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972); Hobson Constr. Co. v. Holiday Inns, Inc., 14 N.C. App. 475, 188 S.E.2d 617 (1972); Smith v. Smith, 15 N.C. App. 180, 189 S.E.2d 525 (1972); Medlin v. Medlin, 17 N.C. App. 582, 195 S.E.2d 65 (1973); Castle v. B.H. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973); Trotter v. Hewitt, 19 N.C. App. 253, 198 S.E.2d 465 (1973); State v. Crews, 284 N.C. 427, 201 S.E.2d 840 (1974); Williamson v. Williamson, 20 N.C. App. 669, 202 S.E.2d 489 (1974); Brewer v. Davis, 21 N.C. App. 309, 204 S.E.2d 242 (1974); Reid v. Midgett, 25 N.C. App. 456, 213 S.E.2d 379 (1975); Lowe's of Winston-Salem, Inc. v. Thompson, 26 N.C. App. 198, 214 S.E.2d 813 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975); Traber v. Crawford, 28 N.C. App. 694, 222 S.E.2d 713 (1976); Inland Bridge Co. v. North Carolina State Hwy. Comm'n, 30 N.C. App. 535, 227 S.E.2d 648 (1976); Powell v. Bost, 32 N.C. App. 292, 232 S.E.2d 3 (1977).

**Quoted** in Markham v. Swails, 29 N.C. App. 205, 223 S.E.2d 920 (1976); Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976).

**Cited** in Fox v. Miller, 8 N.C. App. 29, 173 S.E.2d 607 (1970); Sawyer v. Shackleford, 8 N.C. App. 631, 175 S.E.2d 305 (1970); Walker v. Pless, 11 N.C. App. 198, 180 S.E.2d 471 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56 (1972); Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); United Artists Records, Inc. v.

Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973); Gunkel v. Kimbrell, 29 N.C. App. 586, 225 S.E.2d 127 (1976); Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977); In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977).

## Rule 53. Referees.

**Editor's Note. —**

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970). For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

**Judge, Not Referee, Has Authority to Enter Judgment upon Reference.** — Where the referee made findings of fact and conclusions of law and purported to enter a judgment against defendant, and the superior court judge confirmed the referee's report but did not enter a judgment on the approved findings and conclusions, the cause must be remanded to the superior court for entry of a proper judgment since only the judge, and not the referee, has authority to enter judgment upon a reference. Rouse v. Wheeler, 17 N.C. App. 422, 194 S.E.2d 555 (1973).

**Right to Jury Trial. —**

In accord with 14th paragraph in original. See Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970), modified on other grounds, 278 N.C. 69, 178 S.E.2d 813 (1971).

A compulsory reference, under provisions of former § 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon the written evidence taken before the referee. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Section (b)(2) provides that a reference does not deprive a party of a jury trial and sets out the steps to be followed to preserve the right. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

Defendants did not waive their right to jury trial on the issue of determining the location of the true boundary line between the lands of the parties by failing to make exceptions to specified findings of fact by the referee where exceptions which defendant did make were sufficient to give plaintiff notice and to present the issue in dispute to the court. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**Where the trial of an issue requires the examination of a complicated account** the trial court may, upon its own motion, order a reference. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

**Failure to Formulate Appropriate Issues Based on Exceptions Constitutes Waiver.** — Having failed to formulate appropriate issues based upon the exceptions taken, defendants waived their right to jury trial. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

**Cited** in Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977).

## ARTICLE 7.

## *Judgment.*

## Rule 54. Judgments.

**History.** — See Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

**One of the purposes of this rule is to minimize fragmentary appeals.** Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976), rev'd on other grounds, 292 N.C. 93, 232 S.E.2d 667 (1977).

**Section (b) is substantially similar to the federal Rule 54(b)** as that rule was amended in 1961. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974).

**Need for section (b) arose from increased opportunity for liberal joinder** of claims and parties which the new Rules of Civil Procedure provided. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974).

**Under section (b), the trial court performs the function of "dispatcher"** also in multiple-party actions as well as in multiple-claim actions. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974).

Under Rule 54(b) the trial court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate time when each "final decision" upon "one or more but less than all" of the claims in a multiple-claim action is ready for appeal. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974). But see

Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

**Definition of Final Judgment. —**

In accord with 2nd paragraph in original. See Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973).

By making the express determination in the judgment that there is "no just reason for delay," the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974); Raynor v. Mutual of Omaha, 24 N.C. App. 573, 211 S.E.2d 458 (1975).

**Definition of Interlocutory Order. —**

In accord with 3rd paragraph in original. See Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973).

In the absence of an express determination in the judgment that there is "no just reason for delay," section (b) makes any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, interlocutory and not final. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974); Raynor v. Mutual of Omaha, 24 N.C. App. 573, 211 S.E.2d 458 (1975); Newton v. Standard Fire Ins. Co., 27 N.C. App. 168, 218 S.E.2d 231 (1975). But see Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Where the judgment adjudicates the rights and liabilities of fewer than all the parties and contains no determination by the trial judge that "there is no just reason for delay," and although the claims of the respective defendants against each other do not seem to affect the plaintiff's rights, it is clear that under this rule the judgment is interlocutory and not appealable. Nytco Leasing, Inc. v. Dan-Cleve Corp., 25 N.C. App. 18, 212 S.E.2d 41, cert. denied, 288 N.C. 241, 216 S.E.2d 910 (1975). But see Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Where order dismissing plaintiffs' claim against defendants and dismissing by consent counterclaim of defendants against plaintiffs adjudicated fewer than all the claims of all the parties and did not contain a determination by the trial judge that there was "no just reason for delay" in entering such order, the order was interlocutory and not appealable. Durham v. Creech, 25 N.C. App. 721, 214 S.E.2d 612 (1975). But see Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Judgment dismissing plaintiff's claim which adjudicates the rights and liabilities of fewer than all the parties and expressly retains jurisdiction for the purpose of adjudication with respect to defendants' counterclaim without providing "no just reason for delay" is interlocutory and not appealable. Rorie v. Blackwelder, 26 N.C. App. 195, 215 S.E.2d 397, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

An appeal is subject to dismissal when the judgment from which the appeal is taken purportedly "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and the trial court does not find there was "no just reason for delay." Equitable Leasing Corp. v. Kingsmen Prods., Inc., 27 N.C. App. 661, 220 S.E.2d 95 (1975).

Attempted appeal from an order dismissing fewer than all of plaintiffs' claims is premature where the trial court did not find that there is no just reason for delay. Mozingo v. North Carolina Nat'l Bank, 27 N.C. App. 196, 218 S.E.2d 506 (1975).

The joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Summary judgment dismissing the action as to two defendants adjudicated the rights and liabilities of fewer than all the parties contained no determination by the trial judge that there was no just reason for delay, and therefore was not a final judgment and not appealable. Beach & Adams Bldrs., Inc. v. Felton, 27 N.C. App. 334, 219 S.E.2d 287 (1975).

**The addition of the language, "except as expressly provided by these rules or other statutes,"** in subsection (b) is clearly intended to except from the prohibition of review of nonfinal partial adjudications, those orders or judgments which, by virtue of §§ 1-277 and 7A-27(d), are reviewable despite their interlocutory nature. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

The General Assembly in section (b) used the words "as expressly provided by these rules or other statutes" in order to avoid any conflict between this rule and §§ 1-277(a) and 7A-27(d). Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Where a party has a statutory right of appeal pursuant to §§ 1-277 or 7A-27 even from an interlocutory order, section (b) will never bar appeal even though the order appealed from fails to find "no just reason for delay." Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

**The provision "shall not then be subject to review either by appeal or otherwise except as expressly provided** by these rules or other statutes," not included in the federal rules, may give a court, by certiorari or otherwise, limited power to allow appellant review of an interlocutory order under this rule, but in view of all of the provisions of the rule, including the right of the trial court to revise the order or judgment at any time before final adjudication, this provision should be strictly construed; and discretionary authority thereunder, if any, should be exercised sparingly in extraordinary circumstances to avoid a harsh result. Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976), rev'd on other grounds, 292 N.C. 93, 232 S.E.2d 667 (1977).

**Applied** in Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56 (1972); Siders v. Gibbs, 26 N.C. App. 333, 215 S.E.2d 813 (1975); Christopher v. Bruce-Terminix Co., 26 N.C. App. 520, 216 S.E.2d 375 (1975); Hall v. Hall, 28 N.C. App. 217, 220 S.E.2d 158 (1975); North Carolina Nat'l Bank v. Gillespie, 28 N.C. App. 237, 220 S.E.2d 862 (1976); Beck v. Beck, 28 N.C. App. 488, 221 S.E.2d 763 (1976); McRae v. Moore, 29 N.C. App. 507, 224 S.E.2d 696 (1976); J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840 (1976); Reid v. Reid, 29 N.C. App. 754, 225 S.E.2d 649 (1976); Tifco, Inc. v. Insurance Designers Underwriters Group, Inc., 30 N.C. App. 641, 228 S.E.2d 60 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977).

**Quoted** in Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871 (1972); Huffman v. Gulf Oil Corp., 26 N.C. App. 376, 216 S.E.2d 383 (1975).

**Cited** in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977).

## Rule 55. Default.

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) *Judgment.* — Judgment by default may be entered as follows:

(1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge. — In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by

jury to the parties when and as required by the Constitution or by any statute of North Carolina.

(c) *Service by publication.* — When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclosure mortgages thereon such bond shall not be required.

(1971, cc. 542, 1101; 1977, c. 675.)

**Editor's Note.** — The first 1971 amendment deleted "or without the State" in the catchline to section (c).

The second 1971 amendment added the last sentence in the first paragraph of subsection (1) of section (b).

The 1977 amendment inserted "motion of attorney for the plaintiff" in section (a).

As the rest of this rule was not changed by the amendments, only sections (a), (b) and (c) are set out.

Section 105-414, referred to in section (b)(1) of this rule, was repealed by Session Laws 1971, c. 806, s. 3.

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

**This rule appears to be a counterpart of Federal Rule 55.** Rawleigh, Moses & Co. v. Capital City Furniture, Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970); Harris v. Carter, 33 N.C. App. 179, 234 S.E.2d 472 (1977).

**Application of Rule.** — This rule has no application where plaintiff does not proceed under it after defendant fails to file answer within the required time but allows the case to be regularly scheduled for trial. Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972).

**This Rule Has No Applicability to the Entering of Final Judgments in Condemnation Proceedings.** — See Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976).

**Default Improper in Declaratory Judgment Action.** — In action for a declaratory judgment, failure of defendants to file an answer to the complaint or to answer interrogatories did not entitle plaintiffs to a judgment against such defendants based on plaintiffs' conclusions and contentions as to the construction of the instrument, since the rights of the parties must be determined by a proper construction of the instrument. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

**Default Established by Defendant's Failure to Answer.** — Under Rule 8(d) the defendant, by failing to answer, admitted that plaintiff was entitled to the possession of the real property. The default was thus established. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Service of the answer is both a "pleading" and an "appearance" for the purpose of this rule.** Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976).

**If the default is established, the defendant has no further standing to contest the merits** of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Section (b)(1) Subject to §§ 1-75.11 and 1-209(4).** — Default judgment by the clerk is provided for by section (b)(1) of this rule, is subject to the jurisdictional proofs required by § 1-75.11 and is still controlled by § 1-209(4) which empowers the clerk to enter all judgments by default final and default and inquiry as are authorized by this rule. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Judgment against Nonappearing Defendant.** — In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of this rule, as well as § 1-75.11. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**The term "contractual security" in subsection (b)(1) includes a laborer's or materialman's lien.** Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

**The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default,** is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If an alleged liability is joint, a default judgment should not be entered against a defaulting defendant until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the nondefaulting defendant(s). This rule may also be applied with propriety where the liability is both joint and several or is in some other respect closely interrelated. These are properly procedural rules whose objective is to attain a correct application of substantive law. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Where there are several defendants a question may arise as to whether, after entry of a default against one, a default judgment can be entered immediately against the defaulting defendant or whether entry must be postponed until all the defendants are in default or the case is tried as to the defendants not in default. The latter alternative is the correct procedure where the liability of the defendants is joint. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Effect on Defaulting Defendant of Adjudication for or against Defending Party.** — In a nonfederal matter the effect upon a defaulting defendant of an adjudication in favor of or against a defending party should, it seems, be a subject for state law to determine; and a subject to be determined independently of state law in a federal matter. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Where joint liability is involved, a successful defense, other than a personal one, inures to the benefit of a defaulting defendant.** Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike — the defaulter as well as the others. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If joint liability is decided against a plaintiff on the merits or that he has no present right of recovery, as distinguished from an adjudication for the nondefaulting defendant on a defense personal to him, the complaint should be dismissed as to all of the defendants — both the defaulting and the nondefaulting defendants. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Where the liability is joint and several or closely interrelated and a defending party establishes that plaintiff has no cause of action** or present right of recovery, this defense generally inures also to the benefit of a defaulting defendant. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**If joint liability is decided against a defending party** and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants — both the defaulting and nondefaulting defendants. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If the suit is decided in the complainant's favor, he will then be entitled to a final decree against all defendants — the defaulter as well as the others. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Authority of Clerk Is Concurrent with That of Judge.** — The authority of the clerk of court to enter judgments in certain instances is concurrent with and in addition to that of the judge of the superior court. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

**And Judge Is Not Deprived of Jurisdiction Thereby.** — The judge of the superior court is in no way deprived of jurisdiction simply because the clerk, in certain instances, has concurrent jurisdiction. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

**When Clerk May Enter Judgment.** — There are two basic requirements that must be fulfilled before a clerk can enter a default judgment. These requirements are: (1) The plaintiff's claim must be for a sum certain or for a sum that can by computation be made certain, and (2) the defendant must have been defaulted for failure to appear and he must not have been an infant or incompetent person. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977).

This section is clearly intended to allow a clerk to enter default judgment against a defendant only if he has never made an appearance. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977).

**When Judgment Must Be Entered by Judge.** — When a party, or his representative, has appeared in an action and later defaults, then section (b) requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977).

**This rule does not provide for judgments by "default and inquiry" per se** and in any event the rule authorizes the clerk to enter only those judgments which would have been designated formerly as "default final." Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**The entry of default and entry of default judgment by the clerk may be simultaneous** and can be contained in the same document. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Same Judge Need Not Enter Default Judgment and Default Final.** — Section (b)(2) of this rule does not require the same judge who enters the default judgment to likewise conduct the jury trial to determine damages and enter the default final. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

**A motion to set aside a default or a judgment by default is addressed to the discretion of the court.** North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

A motion pursuant to section (d) to set aside an entry by default is addressed to the discretion of the trial court. Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976).

The determination of whether an adequate basis exists for setting aside the entry of default and the judgment by default rests in the sound discretion of the trial judge. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Presumption that Judge Acted Within Discretion.** — Where appellant failed to bring the evidence up for review, the appellate court presumed that the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default. Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

**Discretion Not Abused.** — Where the defendant did not offer any evidence showing a good reason for her default upon which the judge could have set aside the entry of default; nor was there an adequate basis shown for the judge to have set aside the judgment by default on the grounds of mistake, inadvertence, surprise, excusable neglect or meritorious defense, the judge did not abuse her discretion in failing to set aside the entry of default or the judgment by default. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**An adequate basis for the motion must be shown.** North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Considerations in Exercising Discretion.** — See Howell v. Haliburton, 22 N.C. App. 40, 205 S.E.2d 617 (1974).

**Default Judgments Not Favored.** — In exercising its discretion the court will be guided by the fact that default judgments are not favored in the law. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**An entry of default is to be distinguished from a judgment by default.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); Miller v. Miller, 24 N.C. App. 319, 210 S.E.2d 438 (1974).

**The "entry of default" has been characterized as a ministerial duty.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Miller v. Miller, 24 N.C. App. 319, 210 S.E.2d 438 (1974).

**An entry is only an interlocutory act** looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); First-Citizens Bank & Trust Co. v. R & G Constr. Co., 24 N.C. App. 131, 210 S.E.2d 97 (1974); Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

**And Might Be Set Aside on Showing That Would Not Justify Setting Aside Judgment.** — A court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

The rules evidently make a distinction between what is required to make a good case for setting aside a default and what is required to set aside a judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**First Clause of Section (d) Governs Motion to Vacate Entry of Default.** — A default but no judgment having been entered, the motion to vacate the default is governed by the first clause of section (d) of this rule. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**And Reference to Rule 60 Is Unnecessary.** — Where defendant's motion to set aside and vacate entry of default is governed by section (d) of this rule, any reference to or discussion of Rule 60 governing the setting aside of judgment by default is unnecessary and surplusage. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

**A motion to set aside a default is addressed to the discretion of the court.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

It is clear, under the federal cases, that a determination of whether or not good cause exists rests in the sound discretion of the trial judge, and that the facts and circumstances of the particular case govern. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Howell v. Haliburton, 22 N.C. App. 40, 205 S.E.2d 617 (1974).

There would be no reason for the distinction between setting aside an entry of default and setting aside a default judgment unless section (d) of this rule intended to commit the matter of setting aside an entry of default entirely to the discretion of the court, to be exercised, of course, within the usual discretionary limits. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

The determination of whether good cause exists under section (d) rests in the sound discretion of the trial judge and his ruling will not be disturbed unless a clear abuse of discretion is shown. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); Miller v. Miller, 24 N.C. App. 319, 210 S.E.2d 438 (1974).

The determination of good cause is for the trial judge in the exercise of his sound discretion. Pioneer Acoustical Co. v. Cisne & Associates, 25 N.C. App. 114, 212 S.E.2d 402 (1975).

**Any doubt should be resolved in favor of setting aside defaults** so that the cases may be decided on their merits. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**To set aside a default all that need be shown is good cause.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

Where the facts of a case are sufficient to warrant a conclusion by the trial judge that a defendant has shown good cause for his failure to file an answer, the action of a trial judge in vacating the entry of default must be upheld. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

**Inadvertence, even if not strictly "excusable," may constitute good cause,** particularly in a case where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**There is no necessity for a finding of excusable neglect** in granting a motion to set aside and vacate the entry of default. Hence a plaintiff's assignment of error directed at a trial judge's conclusion that excusable neglect existed is to no avail, and such finding is surplusage and though erroneous is not prejudicial. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**Default Set Aside.** — In view of the lack of any substantial prejudice to plaintiff, the claim of a meritorious defense, and the absence of any gross neglect on the part of defendant, the default was set aside. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**The rule as to what is required to set aside a judgment** specifies "mistake, inadvertence, surprise, or excusable neglect." This has been construed to mean that the mistake, inadvertence, or surprise, as well as neglect, must be excusable in order to give the court the power to set aside the judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**Meritorious Defense and Good Reason for Default Must Be Shown.** — The court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was a good reason for the default and that he has a meritorious defense to the action. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

The fact that defendant has a meritorious defense does not justify setting the judgment aside if no good excuse for the default is shown; and the merits of the controversy will not be considered unless an adequate reason for the default is shown. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**What Constitutes Appearance.** — Negotiations between parties after institution of an action may constitute an appearance. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

A party may appear without pleading. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Defendant Held to Have Appeared in Action.** — Where defendant filed an application for an extension of time in which to answer, filed a motion to vacate entry of default, filed a motion to dismiss the complaint and was present for a hearing in superior court on his motion to vacate, he appeared in the action within the meaning of section (b)(2) and should have been served with written notice of plaintiff's application for default judgment at least three days prior to the hearing on the application; failure to provide the statutory notice requires that the default judgment be vacated. Miller v. Belk, 18 N.C. App. 70, 196 S.E.2d 44, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (1973).

**Basis for Finding Defendant Neither Infant nor Incompetent.** — Where the verified complaint stated: "Defendant is a citizen and resident of the County of Person, State of North Carolina, and is of a legal age and under no legal disability," there was basis upon which the court could find that the defendant was neither an infant nor an incompetent person. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

**Order Is Interlocutory and Not Appealable.** — Order setting aside or refusing to set aside an entry of default where judgment has not been entered is not a final order and is, therefore, not appealable. First-Citizens Bank & Trust Co. v. R & G Constr. Co., 24 N.C. App. 131, 210 S.E.2d 97 (1974).

Order entered pursuant to section (d), setting aside entry by default, is interlocutory and plaintiff's appeal is premature. Pioneer Acoustical Co. v. Cisne & Associates, 25 N.C. App. 114, 212 S.E.2d 402 (1975).

**Applied** in Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974); Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977).

**Quoted** in Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**Cited** in East v. Smith, 11 N.C. App. 604, 182 S.E.2d 266 (1971); Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976).

## Rule 56. Summary judgment.

**Editor's Note. —**

For note dealing with summary judgment on testimonial evidence, see 55 N.C.L. Rev. 232 (1977).

**Rule 56 and its federal counterpart are practically the same.** Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

The text of this rule and that of Federal Rule 56 are practically the same. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

Federal Rule 56 is substantially the same as this rule and the Supreme Court therefore looks to the federal decisions for guidance in applying this rule. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

**Federal Rule 56 eliminated earlier restrictions** and made the procedure of summary judgment available to both plaintiff and defendant in all types of cases to which the federal rules are applicable. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

**Motion for Summary Judgment Is a New Procedure.** — The motion for summary judgment under this rule is a procedure new to the courts of this State. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

Summary judgment is a new procedure in North Carolina. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Summary judgment may encompass more than a demurrer.** Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**But it often arises in the same manner and has the same effect as the former practice with the demurrer.** Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Unlike Demurrer, Motion Allows Court to Consider Matter outside Complaint.** — A demurrer was a proper method of testing the legal sufficiency of the complaint, but it was confined only to the complaint itself. A motion for summary judgment allows the court to consider matter outside of the complaint for the purpose of ascertaining whether a genuine issue of fact does exist. This recognizes the fact that a genuine issue of fact may not exist, even though one may appear in the complaint which is well pleaded. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment motions,** the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under this rule the court may receive and consider various kinds of evidence. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

**Motions Considered as Though Made under Rule 12(c).** — Where the record on appeal contains no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base decision, the motions will be considered as though made under Rule 12(c) for judgment on the pleadings, not a motion under this rule. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

**Summary Judgment Not Precluded by Earlier Denial of Motion under Rule 12(b)(6).** — The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which merely challenges the sufficiency of the complaint, does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Acting on Motion where Interrogatories Unanswered.** — Although unanswered interrogatories will not, in every case, bar the trial court from acting on motion for summary judgment, doing so prior to the filing of objections or answer to the interrogatories is improper. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Summary judgment is a drastic remedy.** First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

**Rule Must Be Used Cautiously.** — Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d

823 (1971); Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972).

Summary judgment is a drastic remedy, and its requirements must be carefully observed in order that no person be deprived of a trial on a genuinely disputed issue. Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976).

Summary judgment is an extreme remedy and is appropriate only where no genuine issue of material fact is presented. Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976).

Summary judgment is an extreme remedy and should be cautiously invoked to the end that parties will always be afforded a trial where there is a genuine dispute of facts between them. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438, cert. denied, 287 N.C. 465, 215 S.E.2d 624 (1975).

Summary judgment is an extreme remedy which should only be used where no genuine issue of material fact is presented. Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972).

Summary judgment is a drastic remedy, one to be approached with caution. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Summary judgment should be used cautiously. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

**Granting Summary Judgment Made by Judge on Own Motion.** — The granting of a summary judgment or judgment on the pleadings, when made by the trial judge on his own motion, is a practice not to be commended, and is clearly erroneous in a case when there is a factual question to be answered appropriately. Crews v. Taylor, 21 N.C. App. 296, 204 S.E.2d 193 (1974).

**Right to Judgment as a Matter of Law Must Appear.** — In order for the granting of plaintiff's motion for summary judgment to be appropriate, it must appear from the items submitted in support of plaintiff's motion that the plaintiff was entitled to judgment as a matter of law. Atkinson v. Wilkerson, 10 N.C. App. 643, 179 S.E.2d 872 (1971).

Movant for summary judgment must make it perfectly clear that he was entitled to judgment as a matter of law. Shook Bldrs. Supply Co. v. Eastern Assocs., 24 N.C. App. 533, 211 S.E.2d 472 (1975).

The moving party must, in order to prevail on a motion under this section, make it perfectly clear that he was entitled to judgment as a matter of law. Lambert v. Duke Power Co., 32 N.C. App. 169, 231 S.E.2d 31 (1977).

The motion for summary judgment should be granted only if, as a matter of law, the evidence is insufficient to support a verdict for the nonmovant. Freeman v. Sturdivant Dev. Co., 25 N.C. App. 56, 212 S.E.2d 190 (1975).

**Motion May Be Made after Responsive Pleadings.** — The broad statutory limitation that the motion for summary judgment may be made "at any time" allows the motion to be made after responsive pleadings have been filed or before filing of responsive pleadings. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972).

**But Cannot Be Initially Made in Appellate Court.** — The Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

**Summary judgment is not a proper remedy for failure to join** a necessary party rather a motion to dismiss for failure to join a necessary party would be proper. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

The court should never resolve an issue of fact, but summary judgments should be looked upon with favor where no genuine issue of material fact is presented. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**But It Is Proper in Declaratory Judgment Action.** — Summary judgment is proper in an action seeking a declaratory judgment as to the validity of a zoning ordinance where there is no substantial controversy as to the facts disclosed by the evidence, but the controversy is as to the legal significance of those facts. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

**Summary judgments should be looked upon with favor where no genuine issue of material fact is presented.** Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

**This rule is not limited in its application to any particular type or types of action.** Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972).

**And the procedure is available to both plaintiff and defendant.** Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972).

Summary judgment is available to a claimant as well as to a defendant. Clear Fir Sales Co. v. Carolina Plywood Distrib., Inc., 13 N.C. App. 429, 185 S.E.2d 737 (1972).

**Two types of cases are involved:** (a) those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts if in controversy and it can be appropriately decided without full exposure of trial. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973).

**Lack of Cause of Action or Defense Supports Grant of Judgment.** — Where the pleadings or proof disclose that no cause of action or defense exists, a summary judgment may be granted. Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

Where the pleadings or proof disclose that no cause of action exists, a summary judgment may be granted. Davenport v. Davenport, 25 N.C. App. 621, 214 S.E.2d 294 (1975).

**It is only in the exceptional negligence case that this rule should be invoked.** This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay, and what was the proximate cause of the aggrieved party's injuries. Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971).

It is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man or other applicable standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976).

While Rule 56, like its federal counterpart, is available in all types of litigation to both plaintiff and defendant, as a general proposition issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973).

Summary judgment will not usually be feasible in negligence cases where the standard of the prudent man must be applied. Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972).

While neither the federal rules nor this rule excludes the use of the summary judgment procedure in negligence actions, it is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Brawley v. Heymann, 16 N.C. App. 125, 191 S.E.2d 366, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

While summary judgment will often not be feasible in negligence cases where the standard of the prudent man must be applied, it is proper in such cases where it appears that there can be no recovery even if the facts as claimed by plaintiff are proved. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

Summary judgment is appropriate in a negligence case only under exceptional circumstances, since, ordinarily, the rule of the prudent man should be applied by the jury under appropriate instructions from the court. Stancill v. City of Washington, 29 N.C. App. 707, 225 S.E.2d 834 (1976).

**The purpose of the summary judgment rule** is to provide an expeditious method for determining whether a material issue of fact actually exists. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

The purpose of the summary judgment rule is to provide an expeditious method for determining whether any disputed material issue of fact does actually exist. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970); Blackmon v. Valley Decorating Co., 11 N.C. App. 137, 180 S.E.2d 396 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

It is the purpose of the summary judgment procedure to determine if disputed material issues of fact exist. Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971).

The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Yount v. Lowe, 24 N.C. App. 48, 209 S.E.2d 867 (1974), aff'd, 288 N.C. 90, 215 S.E.2d 563 (1975); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

The purpose of the summary judgment procedure provided by this rule is to ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is entitled to judgment as a matter of law. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972); Cameron-Brown Capital Corp. v. Spencer, 31 N.C. App. 499, 229 S.E.2d 711 (1976).

The purpose of this rule is to eliminate formal trials where only questions of law are involved. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Nat Harrison Associates v. North Carolina State Ports Authority, 280 N.C. 251, 185 S.E.2d 793 (1972); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

Summary judgment is to avoid a useless trial. It is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts. While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of the motion of summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Town of Southern Pines v. Mohr, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

This rule is for the disposition of cases where there is no genuine issue of fact. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

The purpose of the summary judgment rule is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists, and if not, whether the moving party is entitled to judgment as a matter of law. Schoolfield v. Collins, 12 N.C. App. 106, 182 S.E.2d 648 (1971), rev'd on other grounds, 281 N.C. 189, 189 S.E.2d 208 (1972); Gudger v. Transitional Furn., Inc., 30 N.C. App. 387, 226 S.E.2d 835 (1976).

The purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972).

The function of the motion for summary judgment is to determine if there is any genuine issue as to any material fact and, if there is no such issue, to provide for an efficient disposition of the matter. Doggett v. Welborn, 18 N.C. App. 105, 196 S.E.2d 36, cert. denied, 283 N.C. 665, 197 S.E.2d 873 (1973).

Summary judgment procedure is designed to permit penetration in advance of trial of unfounded claims or defenses and to allow summary disposition when this is effectively done. Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

The purpose of the motion for summary judgment is to determine prior to trial whether there is any genuine issue with respect to any material fact and, if not, to provide for an early and effective disposition of the matter. Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172, appeal dismissed, 288 N.C. 238, 217 S.E.2d 678 (1975).

The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

The purpose of this rule is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Arnold v. Howard, 29 N.C. App. 570, 225 S.E.2d 149 (1976).

The rule is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

The purpose of this rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The obvious purpose of summary judgment is to save time and expense in cases where there is no "genuine issue" as to any material fact. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

**The purpose of the rule is not to resolve a disputed material issue of fact**, if one exists. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970); Blackmon v. Valley Decorating Co., 11 N.C. App. 137, 180 S.E.2d 396 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Stonestreet v. Compton Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973).

In passing upon a motion for summary judgment pursuant to this rule, it is not the purpose of the court to resolve disputed material issues of fact. Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977).

In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Whitten v. Bob

King's AMC/Jeep, Inc., 30 N.C. App. 161, 226 S.E.2d 530 (1976), rev'd on other grounds, 292 N.C. 84, 231 S.E.2d 891 (1977).

This rule does not authorize the court to decide an issue of fact. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

**Or to Provide Quick and Easy Method for Clearing Docket.** — The purpose of summary judgment is not to provide a quick and easy method for clearing the docket, but is to permit the disposition of cases in which there is no genuine controversy concerning any fact material to issues raised by the pleadings, so that the litigation involves questions of law only. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

It is not the purpose of the summary judgment procedure to resolve disputed material issues of fact. Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971).

**The summary judgment rule was not intended to deprive a party of a jury trial.** Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Court's Function on Motion for Summary Judgment.** — Upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971); Stonestreet v. Compton Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975).

It is not the duty of the court hearing a motion for summary judgment to decide an issue of fact, but rather to determine whether a genuine issue as to any material fact exists. Clear Fir Sales Co. v. Carolina Plywood Distrib., Inc., 13 N.C. App. 429, 185 S.E.2d 737 (1972).

The standard fixed by the rule does not contemplate that the court is to decide an issue of fact, but rather it impels the court to determine whether a real issue of fact exists. Keith v. G.D. Reddick, Inc., 15 N.C. App. 94, 189 S.E.2d 775 (1972); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438, cert. denied, 287 N.C. 465, 215 S.E.2d 624 (1975).

The court's sole function in ruling on a motion for summary judgment is to determine whether there exists any genuine issue of material fact to be tried, not to decide issues of fact. Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972).

On the hearing of a motion for summary judgment, it is not the duty of the court to decide an issue of fact but rather to determine whether a genuine issue as to any material fact exists. Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 287 N.C. 426, 192 S.E.2d 836 (1972).

The rule does not contemplate that the court will decide an issue of fact, but rather will determine whether a real issue of fact exists. Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973).

It is not the province of the court to find the facts upon a motion for summary judgment. Its province is to determine whether there are genuine issues of material fact in dispute. Eggimann v. Wake County Bd. of Educ., 22 N.C. App. 459, 206 S.E.2d 754, cert. denied, 285 N.C. 756, 209 S.E.2d 280 (1974).

In ruling on a motion for summary judgment, the court does not resolve issues of fact but goes beyond the pleadings to determine whether there is a genuine issue of material fact. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974).

In ruling on a motion for summary judgment the trial judge does not make findings of fact, which are decisions upon conflicting evidence, but he may properly list the uncontroverted material facts which are the basis of his conclusions of law and judgment. Rodgerson v. Davis, 27 N.C. App. 173, 218 S.E.2d 471, cert. denied, 288 N.C. 731, 220 S.E.2d 351 (1975).

Function of trial judge is to examine the materials, determine what facts are established and conclude whether there is a genuine issue as to any material fact and if a party is entitled to judgment as a matter of law. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

In passing upon a motion for summary judgment, the court does not decide facts but makes a determination whether an issue exists which is germane to the cause of action. Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976); Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687 (1977).

Upon a motion for summary judgment, the court does not attempt to resolve issues of fact but to determine whether there is a genuine issue of material fact to be tried. Lambert v. Duke Power Co., 32 N.C. App. 169, 231 S.E.2d 31 (1977).

The court does not decide facts but makes a determination as to whether there exists an issue which is germane to the action. Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977).

**And Not to Test Sufficiency of Evidence.** — The office of summary judgment is not to test the sufficiency of the evidence. Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

**The court went far beyond the purview of summary judgment** when the court treated the hearing as a nonjury trial of the case on the merits and considered it the court's function to find facts on conflicting evidence, make conclusions of law, and enter final judgment between the parties. Stonestreet v. Compton

Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973).

**Directed Verdict Test Applies to Summary Judgment.** — On motion for summary judgment, the test is whether the moving party presents materials which would require a directed verdict in his favor if offered as evidence at trial. Coakley v. Ford Motor Co., 11 N.C. App. 636, 182 S.E.2d 260, cert. denied, 279 N.C. 393, 183 S.E.2d 244 (1971).

If the same evidence which was presented on motion for summary judgment had been presented at a trial, defendant would have been entitled to a directed verdict; that is the test in determining if a moving party is entitled to summary judgment. Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

If the party moving for summary judgment by affidavit or otherwise presents materials which would require a directed verdict in his favor if presented at trial, he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him or comes forward with affidavits or other materials that show there is a triable issue of fact. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 14 N.C. App. 567, 188 S.E.2d 661 (1972), rev'd on other grounds, 282 N.C. 44, 191 S.E.2d 683 (1972); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

Functionally the motion for summary judgment and the motion for a directed verdict are closely akin to each other. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

If it is clear that a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Where a motion for summary judgment is supported by proof which would require a directed verdict in his favor at trial, movant is entitled to summary judgment unless the opposing party comes forward to show a triable issue of material fact. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

**Test Is Whether There Is Genuine Issue as to Material Fact.** — Where a motion for summary judgment is made and is supported by matters outside the pleadings, the test is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

The question is not whether there is a genuine issue of fact, but whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact. Johnston County Tuberculosis Ass'n v. North Carolina Tuberculosis & Respiratory Disease Ass'n, 15 N.C. App. 492, 190 S.E.2d 264 (1972).

There is no requirement in this rule that the summary judgment, to be valid, must contain the ritual statement that there is no genuine issue as to any material fact. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

Under this rule summary judgment is proper where there exists no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Bogle v. Duke Power Co., 27 N.C. App. 318, 219 S.E.2d 308 (1975), cert. denied, 289 N.C. 296, 222 S.E.2d 695 (1976).

The critical question for determination by the trial court in considering a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, establish a genuine issue as to any material fact. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

The opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

On the motion for summary judgment, the test is whether the pleadings and materials offered in support of the same show that there is no genuine issue as to any material fact. Prather, Thomas, Campbell, Pridgeon, Inc. v. Florilina Properties, Inc., 29 N.C. App. 316, 224 S.E.2d 289 (1976).

**Issues of fact with regard to a motion for summary judgment must be raised in the manner prescribed by this rule.** Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Question for Court Where No Such Issue Exists.** — Where there is no genuine issue as to any material fact, the sole question for the court's determination is whether defendant is entitled to judgment as a matter of law. Weaver v. Home Security Life Ins. Co., 20 N.C. App. 135, 201 S.E.2d 63 (1973); Prather, Thomas, Campbell, Pridgeon, Inc. v. Florilina Properties, Inc., 29 N.C. App. 316, 224 S.E.2d 289 (1976).

Once the movant establishes that there is no genuine issue of material fact the movant must further prove that he is entitled to judgment as a matter of law. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

**If there is a genuine issue of fact, summary judgment is inappropriate.** Williams v. North Carolina State Bd. of Educ., 284 N.C. 588, 201 S.E.2d 889 (1974).

**Motion Granted Only Where No Such Issue Appears.** — Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Ryals v. Barefoot, 19 N.C. App. 564, 199 S.E.2d 483 (1973); Pilot Freight Carriers, Inc. v. David G. Allen Co., 22 N.C. App. 442, 206 S.E.2d 750 (1974), cert. denied, 287 N.C. 465, 215 S.E.2d 625 (1975), cert. denied, 423 U.S. 1055, 96 S. Ct. 786, 46 L. Ed. 2d 644 (1976); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barnes v. Barnes, 30 N.C. App. 196, 226 S.E.2d 549, cert. denied, 290 N.C. 775, 229 S.E.2d 31 (1976); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976); Whitten v. Bob King's AMC/Jeep, Inc., 292 N.C. 84, 231 S.E.2d 891 (1977); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977).

Summary judgment is proper only where movant shows that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971), aff'd, 281 N.C. 697, 190 S.E.2d 189 (1972); Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Harris v. Carter, 33 N.C. App. 179, 234 S.E.2d 472 (1977).

Rendition of summary judgment is conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Van Poole v. Messer, 19 N.C. App. 70, 198 S.E.2d 106 (1973); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Parker v. Bennett, 32 N.C. App. 46, 231 S.E.2d 10 (1977).

Where the moving papers affirmatively disclose that the nature of the controversy presents a good faith and actual, as distinguished from formal, dispute on one or more material issues, summary judgment cannot be used. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972).

Because the burden is on the moving party to establish the lack of a triable issue of fact, the motion may only be granted where he shows he is entitled to a judgment as a matter of law. Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972).

Summary judgment should be granted only when the movant is clearly entitled thereto. Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973).

Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery. Doggett v. Welborn, 18 N.C. App. 105, 196 S.E.2d 36, cert. denied, 283 N.C. 665, 197 S.E.2d 873 (1973).

Summary judgment is proper in negligence actions where it appears that there can be no recovery even if the facts as claimed by plaintiff are true. Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Joyce v. City of High Point, 30 N.C. App. 346, 226 S.E.2d 856 (1976).

When the facts in a negligence action are admitted or established, negligence is a question of law and the court must say whether it does or does not exist. Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973).

If the movant's forecast of evidence which he has available for presentation at trial fails to establish that there is no genuine issue of fact remaining for determination, summary judgment is not proper, whether or not the opponent responds. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

If a genuine issue of material fact does exist, the motion for summary judgment must be denied; the motion may be granted only where there is no such issue and the moving party is entitled to judgment as a matter of law. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974).

A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Caldwell v. Deese, 26 N.C. App. 435, 216 S.E.2d 452, rev'd on other grounds, 288 N.C. 375, 218 S.E.2d 329 (1975).

The motion for summary judgment should not be granted unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Motion for summary judgment must be denied if the opposing party submits affidavits or other supporting material which casts doubts upon the existence of a material fact or upon the credibility of a material witness, or if such doubts are raised by movant's own evidentiary material. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

A motion for summary judgment shall be allowed only when the evidence reveals no genuine issue as to any material fact and when the moving party is entitled to a judgment as a matter of law. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

This rule permits a summary judgment upon a showing of two conditions: (1) That there is no genuine issue as to any material fact, and (2) that one party is entitled to a judgment as a matter of law. Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977).

**And Presence of Difficult Question of Law Is No Barrier.** — Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

**The determination of what constitutes a "genuine issue as to any material fact"** in section (c) is often difficult. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

**A genuine issue is one which can be maintained by substantial evidence.** Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

**When Issue Is Material.** — An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977).

An issue is material if the facts alleged would constitute a legal defense or would affect the result of the action. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

**A question of fact which is immaterial does not preclude summary judgment.** Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Keith v. G.D. Reddick, Inc., 15 N.C. App. 94, 189 S.E.2d 775 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977).

**The burden is on the moving party to establish the lack of a triable issue of fact.** Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971); Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); Hinson v. Jefferson, 20 N.C. App. 204, 200 S.E.2d 812 (1973); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Shook Bldrs. Supply Co. v. Eastern Assocs., 24 N.C. App. 533, 211 S.E.2d 472 (1975); Freeman v. Sturdivant Dev. Co., 25 N.C. App. 56, 212 S.E.2d 190 (1975); Cameron-Brown Capital Corp. v. Spencer, 31 N.C. App. 499, 229 S.E.2d 711 (1976).

The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Wall v. Flack, 15 N.C. App. 747, 190 S.E.2d 671 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975); Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976); Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976).

The party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact. Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); Liberty Loan Corp. v. Miller, 15 N.C. App. 745, 190 S.E.2d 672 (1972); Brawley v. Heymann, 16 N.C. App. 125, 191 S.E.2d 366, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

Authoritative decisions interpreting and applying Rule 56, both State and federal, hold that the party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974).

Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974); Keith v. S.S. Kresge Co., 29 N.C. App. 579, 225 S.E.2d 135 (1976).

The party moving for summary judgment has the burden of establishing the lack of a genuine issue of material fact, and in that regard, the papers of the opposing party are indulgently regarded. Van Poole v. Messer, 19 N.C. App. 70, 198 S.E.2d 106 (1973); Whitten v. Bob King's AMC/Jeep, Inc., 30 N.C. App. 161, 226 S.E.2d 530 (1976), rev'd on other grounds, 292 N.C. 84, 231 S.E.2d 891 (1977).

The movant must meet his burden of proof even when he does not have the burden of proof at trial. Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974).

The burden of proof may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974).

The burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned, and rests on him whether he is by it required to show the existence or nonexistence of facts. Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974).

Upon motion for summary judgment the movant has the burden of establishing that there is no genuine issue of fact remaining for determination. If he meets that burden of proof, he is entitled to judgment as a matter of law. Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975).

The party moving for summary judgment carries the burden of producing evidence of the necessary certitude to negative plaintiff's claim in its entirety and thereby demonstrate a lack of genuine issues of material fact. Caldwell v. Deese, 26 N.C. App. 435, 216 S.E.2d 452, rev'd on other grounds, 288 N.C. 375, 218 S.E.2d 379 (1975).

As movant, defendant has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized, and those of the opposing party are on the whole indulgently treated." Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

The burden is on the party moving for summary judgment to show that there is no genuine issue of material fact regardless of who will have the burden of proof on the issue concerned at the trial. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

Every party moving for summary judgment has the burden of proving that it is entitled to judgment in its favor. Olney Paint Co. v. Zalewski, 29 N.C. App. 149, 223 S.E.2d 573 (1976).

For summary judgment to be appropriate for the party with the burden of persuasion he must still succeed on the strength of his own evidence even though his affidavits and supporting material are not challenged as provided by sections (e) and (f) of this rule. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Upon a motion for summary judgment, the burden is upon the moving party to establish that there is no genuine issue of fact remaining for determination and that the movant is entitled to judgment as a matter of law. Hicks v. Old Republic Life Ins. Co., 29 N.C. App. 561, 225 S.E.2d 164 (1976).

The burden of clearly establishing lack of a triable issue is on the moving party. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

Upon a motion for summary judgment, the moving party has the burden of offering evidence to show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. Boone v. Fuller, 30 N.C. App. 107, 226 S.E.2d 191 (1976).

A party moving for summary judgment must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Stancill v. City of Washington, 29 N.C. App. 707, 225 S.E.2d 834 (1976).

A party moving for summary judgment has the burden of clearly establishing that there is no genuine issue as to any material fact and that as a result he is entitled to a judgment as a matter of law. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

The burden on the party moving for summary judgment may be carried by proving that an essential element of the opposing party's claim is nonexistent. Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976).

**And Court Must View Record in Light Most Favorable to Opposing Party.** — When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970); Blackmon v. Valley Decorating Co., 11 N.C. App. 137, 180 S.E.2d 396 (1971); Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972); Brawley v. Heymann, 16 N.C. App. 125, 191 S.E.2d 366, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Hinson v. Jefferson, 20 N.C. App. 204, 200 S.E.2d 812 (1973) Hickory White Trucks, Inc. v. Bridges, 30 N.C. App. 355, 227 S.E.2d 134 (1976); Brice v. Moore, 30 N.C. App. 365, 226 S.E.2d 882 (1976).

Any doubt as to whether a genuine issue as to any material fact exists must be resolved in the favor of the party opposing the motion for summary judgment. Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971).

The movant is held by most courts to a strict standard in all cases and all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

On a motion for summary judgment, the papers supporting the movant's position are to be closely scrutinized, while the opposing papers are to be indulgently treated. Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Liberty Loan Corp. v. Miller, 15 N.C. App. 745, 190 S.E.2d 672 (1972); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Whitten v. Bob King's AMC/Jeep, Inc., 30 N.C. App. 161, 226 S.E.2d 530 (1976), rev'd on other grounds, 292 N.C. 84, 231 S.E.2d 891 (1977).

Facts asserted by the party answering a summary judgment motion must be accepted as true. Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974).

In passing upon a motion for summary judgment, all affidavits, depositions, answers to interrogatories, and other material filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from such material. Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974).

Because the moving party has the burden of showing that there is no triable issue of fact, his papers are carefully scrutinized. Shook Bldrs. Supply Co. v. Eastern Assocs., 24 N.C. App. 533, 211 S.E.2d 472 (1975).

Papers of the party opposing the motion under this rule are indulgently regarded and all inferences drawn in his favor. Freeman v. Sturdivant Dev. Co., 25 N.C. App. 56, 212 S.E.2d 190 (1975).

In considering a motion for directed verdict, the court must view the evidence in the light most favorable to the nonmoving party, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. Freeman v. Sturdivant Dev. Co., 25 N.C. App. 56, 212 S.E.2d 190 (1975).

The papers of the party moving for summary judgment are carefully scrutinized and all inferences are resolved against him. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

The movant's papers are carefully scrutinized while those of the opposing party are indulgently regarded. Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976).

The moving party's papers must be carefully scrutinized and those of the opposing party must be regarded with indulgence. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

Upon motion for summary judgment the movant's papers are carefully scrutinized while those of the opposing party are indulgently regarded. Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976).

**Granting of summary judgment where the adverse party does not respond to the motion** "by affidavits or as otherwise provided in this rule" is proper only "if appropriate" under all of the circumstances of the case. Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971).

Motion for summary judgment should ordinarily be denied even though the opposing party makes no response, if (1) the movant's supporting evidence is self-contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error, (2) there are significant gaps in the movant's evidence or it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element, or (3) although all the evidentiary or historical facts are established, reasonable minds may still differ over their application to some principle such as the prudent man standard for negligence cases. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Failure to Respond Not Always Fatal.** — Not every failure of the opposing party to respond to a motion for summary judgment will require the entry of summary judgment. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Even Unopposed Evidence Supporting Motion May Not Be Sufficient.** — The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counteraffidavits or other materials. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

The trial court is not required to assign credibility to a party's affidavits merely because they are uncontradicted. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Movant's uncontradicted and unimpeached proofs in support of his motion for summary judgment do not import veracity merely because they are uncontradicted by the opposing party. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Statements in Affidavits May Not Suffice Because Acceptance Depends on Credibility.** — Affidavits in a motion for summary judgment do not supply all the needed proof. The statements in the affidavits may not suffice, because their acceptance as proof depends on credibility. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

If the movant's affidavits seem inherently incredible, if the circumstances themselves are suspect or if the need for cross-examination appears, the court is free to deny the summary judgment motion. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Affidavit Concerning Facts Peculiarly Within Knowledge of Party.** — Courts are slow to grant summary judgment when a movant presents his own affidavit concerning facts which are peculiarly within his knowledge. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Motion Granted on Basis of Party's Own Affidavits.** — Summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction and failed to utilize section (f) of this rule; and (3) when summary judgment is otherwise appropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687 (1977).

A summary judgment may be proper even where based in part upon the affidavits of the movant and witnesses for the movant where there are only latent doubts as to the credibility of the affiants. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

**A court should not resolve an issue of credibility or conduct a "trial by affidavits"** at a hearing on a motion for summary judgment, especially in cases where knowledge of the fact is largely under the control of the movants. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

Absent an unequivocal waiver of a trial on oral testimony, credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

Particularly where the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment. Indeed, it has been said that a witness's demeanor is a kind of "real evidence," and obviously such "real evidence" cannot be included in affidavits. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

A "trial by affidavits" at hearing on the motion for summary is clearly impermissible. Wall v. Flack, 15 N.C. App. 747, 190 S.E.2d 671 (1972).

The trial court, upon motion for summary judgment under this rule, should not undertake to resolve an issue of credibility. Commercial Credit Corp. v. McCorkle, 19 N.C. App. 397, 198 S.E.2d 736 (1973).

**A summary judgment may not be used to withdraw witnesses from cross-examination,** the best method yet devised for testing trustworthiness of testimony; there are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Credibility of Testimony of Interested Witness Submitted to Jury.** — The fact that the witness is interested in the result of the suit has been held to be sufficient to require the credibility of his testimony to be submitted to the jury. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied.** Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

Where plaintiff's interest necessarily raises a question of the credibility of their testimony in support of their motion for summary judgment, and their testimony cannot, under any circumstances, be accorded credibility as a matter of law, summary judgment would be inappropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

**Party Opposing Properly Supported Motion May Not Rely on Bare Allegations of His Pleading.** — If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1970); Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376, cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

In order to show that there is a genuine issue as to facts contained in defendants' affidavits filed in support of their motion for summary judgment which, if established, would defeat a plaintiff's claim, plaintiff may not rest upon the mere allegations of her pleading. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

The requirements of section (e) were enacted to avoid the possibility of any party's manufacturing "facts" to meet a motion for summary judgment. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Subsection (e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Section (e) of this rule clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

Unsupported allegations in the pleadings are insufficient to create a genuine issue as to a material fact where the moving adverse party supports his motion by competent evidentiary matter showing the facts to be contrary to that alleged in the pleadings. Gudger v. Transitional Furn., Inc., 30 N.C. App. 387, 226 S.E.2d 835 (1976).

Plaintiff may not rely on the bare allegations of his complaint where defendants' motions for summary judgment are supported as provided in this rule. Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972).

When the motion for summary judgment is supported, as required by this rule, the adverse party may not rest upon the mere allegations or denials of his pleadings, but he has to respond, by affidavits or as otherwise provided, by setting forth specific facts showing a genuine issue. Brice v. Moore, 30 N.C. App. 365, 226 S.E.2d 882 (1976).

A party against whom the motion for summary judgment is made may not rest upon the allegations or denials of his pleadings, but must demonstrate that there is a genuine issue for trial. Coakley v. Ford Motor Co., 11 N.C. App. 636, 182 S.E.2d 260, cert. denied, 279 N.C. 393, 183 S.E.2d 244 (1971).

Upon a motion for summary judgment the adverse party may not rest upon his complaint and wait for trial to present his evidence, if any, when the moving party has presented affidavits or other matter indicating that summary judgment is appropriate. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 14 N.C. App. 567, 188 S.E.2d 661 (1972), rev'd on other grounds, 282 N.C. 44, 191 S.E.2d 683 (1972).

When a movant makes out a convincing showing that genuine issues of fact are lacking, it is required that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and he does not do that by mere denial or holding back evidence. Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

The plaintiff may not rest upon the mere allegations of her complaint but must respond to a motion for summary judgment with affidavits or other evidentiary matter which sets forth specific facts showing that there is a genuine issue for trial. Caldwell v. Deese, 26 N.C. App. 435, 216 S.E.2d 452, rev'd on other grounds, 288 N.C. 375, 218 S.E.2d 379 (1975).

The denial of a motion for summary judgment may not be based on the adverse party's mere allegations or denials of his pleading. It must be supported by affidavits or as otherwise provided in this rule. The adverse party's response must set forth specific facts showing that there is a genuine issue for trial. Cameron-Brown Capital Corp. v. Spencer, 31 N.C. App. 499, 229 S.E.2d 711 (1976).

**But Must Set Forth Specific Facts Showing Genuine Issue.** — If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971).

In order to show that there is a genuine issue as to facts contained in defendants' affidavits filed in support of their motion for summary judgment which, if established, would defeat a plaintiff's claim, plaintiff's response, by affidavits or otherwise as provided in this rule, "must set forth specific facts showing that there is a genuine issue for trial." Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376, cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1971).

When a motion for summary judgment is made and supported as provided in this rule, the response of an adverse party, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

If the moving party meets his burden of proof, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974).

The party opposing the motion does not have the burden of coming forward with evidentiary material in support of his claim until the movant produces evidence of the necessary certitude which negatives the claim of the party opposing the motion against it in its entirety. Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974); Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975).

If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial and he cannot rest upon the very allegations of his complaint. Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

This rule provides that the adverse party, when responding to motion for summary judgment, must set forth specific facts showing that there is a genuine issue for trial. Beeson v. Moore, 31 N.C. App. 507, 229 S.E.2d 703 (1976).

In order to resist a motion for summary judgment, it is encumbent upon the opposing party to show that he has, or will have, evidence sufficient to raise an issue of fact. This rule does not contemplate the use of affidavits merely to deny allegations in the pleadings. N.C. Monroe Constr. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497, cert. denied, 291 N.C. 323, 230 S.E.2d 676 (1976).

**Party opposing motion for summary judgment does not have to establish that he would prevail** on the issue involved, but merely that the issue exists. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

**The converse of the requirement set forth in section (e)** is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment. Borden, Inc. v. Brower, 17 N.C. App. 249, 193 S.E.2d 751, rev'd on other grounds, 284 N.C. 54, 199 S.E.2d 414 (1973).

**Any party with insufficient access to necessary facts to meet a motion for summary judgment is protected by compliance with section (f).** Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

**When Counteraffidavits Are Unnecessary.** — Where the evidentiary matter supporting the moving party's motion is insufficient to satisfy his burden of proof, it is not incumbent upon the opposing party to present any competent counteraffidavits or other materials. Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971).

Where evidentiary matters supporting a motion for summary judgment are insufficient to establish the lack of a triable issue of fact, it is not incumbent upon the opposing party to present counteraffidavits or other material. Oliver v. Ernul, 14 N.C. App. 540, 188 S.E.2d 679 (1972).

Where the moving papers themselves demonstrate that there is inherent in the problem a factual controversy, then, while it is prudent for the advocate to file one, a categorical counteraffidavit is not essential. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Parker v. Bennett, 32 N.C. App. 46, 231 S.E.2d 10 (1977).

Plaintiff may succeed in defending against the motion for summary judgment if the evidence produced by the movant and considered by the court is insufficient to satisfy movant's burden. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972).

**Evidence which may be considered under this rule** includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

On a motion for summary judgment the court may consider evidence consisting of admissions in the pleadings, depositions, answers to interrogatories, affidavits, admissions on file, oral testimony, documentary materials, facts which are subject to judicial notice, such presumptions as would be available upon trial, and any other materials which would be admissible in evidence at trial. Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Booe v. Hall, 24 N.C. App. 276, 210 S.E.2d 293 (1974); Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975).

When the motion for summary judgment comes on to be heard, the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials; and the court may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

On a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice and any other materials which would be admissible in evidence at trial. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

The court may consider, at the hearing on the motion for summary judgment, pleadings, affidavits which meet the requirements of section (e), depositions, answers to interrogatories, admissions, oral testimony, documentary material, facts subject to judicial notice and such presumptions as would be available at trial. Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

**Unpleaded defenses, when raised by the evidence, should be considered** in resolving a motion for summary judgment. However, it is the better practice to require a formal amendment to the pleadings. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

**Affidavit statements based on hearsay would not be admissible** in evidence and should not be considered in passing on a motion for summary judgment. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

**Oral Testimony Is Admissible.** — Oral testimony at a hearing on a motion for summary judgment is admissible by virtue of Rule 43(e). Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

The provisions of Rule 43(e) can be used in supplementing a summary judgment hearing through the use of oral testimony. This procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

Regarding the use of oral testimony at a hearing on a motion for summary judgment, as distinguished from considering supporting affidavits or depositions which are normally required to be filed before the hearing, such testimony may not give the other party a fair opportunity to rebut, which is particularly important in the case of the party opposing the motion for summary judgment. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Oral testimony on a motion for summary judgment may be admissible in proper cases under Rule 43(e). Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**But Should Be Used Only in Supplementary Capacity.** — Under Rule 43(e), oral testimony offered at a hearing on a motion for summary judgment should be used only in a supplementary capacity to provide a small link of required evidence, and not as the main evidentiary body of the hearing. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

Although Rule 43(e) does permit the court to hear oral testimony in ruling upon a motion for summary judgment, this procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

**Information adduced from counsel during oral arguments** cannot be used to support a motion for summary judgment. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**Where Facts Not Admissible Because of Parole Evidence Rule.** — Where the pleadings, affidavits, and deposition offered by defendant did not set forth facts that would be admissible in evidence because of the parole evidence rule, then such evidence was properly stricken, and since there remained no genuine issue as to any material fact, the court correctly rendered summary judgment for plaintiff. Borden, Inc. v. Brower, 284 N.C. 54, 199 S.E.2d 414 (1973); North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

**Verified Pleading Treated as Affidavit.** — To the extent that a verified pleading meets the requirements of section (e), it may properly be considered as equivalent to a supporting or opposing affidavit. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

A verfied complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

While the object of the last two sentences of section (e) is to pierce general allegations in the nonmovant's pleadings, this rule does not deny that a properly verified pleading which meets all the requirements for affidavits may effectively set forth specific facts showing that there is a genuine issue for trial. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

There is nothing in the rules which precludes the judge from considering a verified answer as an affidavit in the cause. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

Where the plaintiff did not respond to a motion for summary judgment by affidavit or otherwise as provided by this rule, the plaintiff's verified complaint should have been considered by the court in determining whether the defendant had carried the burden of showing the lack of a genuine issue of material fact and whether the defendant was entitled to a judgment as a matter of law. Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971).

Plaintiff cannot rely on a verified complaint which does not meet the requirements of being treatable as an affidavit to defeat defendants' motion, accompanied, as it is, by competent affidavits and depositions. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972).

Certain verified pleadings may be treated as affidavits for purposes of a motion for summary judgment. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

**Unsworn Letters Are Not Affidavits.** — Letters which are not under oath cannot be considered as affidavits. Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971).

An unsworn letter which is nothing more than an expression of plaintiff's attorney's intention to file a claim for damages on behalf of his client does not meet the requirements of this rule as a supporting or opposing affidavit and ought not be considered by a court in its ruling on the motion. Short v. City of Greensboro, 15 N.C. App. 135, 189 S.E.2d 560 (1972).

**Opinions of Nonexperts Are Not Affidavits.** — Letters which contain various opinions of writers who would be competent in court only if they were first established as experts cannot be considered affidavits where there is no admission before the court that any of the writers are experts and none of the letters contain information which would support a finding that they were. Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971).

**Since Opinions Are Not Personal Knowledge.** — An affidavit is not made on personal knowledge when it states why affiant "thinks" an event occurred. Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972).

**And Affidavit Not Based on Personal Knowledge Cannot Be Considered.** — In ruling on a motion for summary judgment, the trial court cannot consider portions of an affidavit not based on the affiant's personal knowledge or merely stating the affiant's legal conclusion. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972).

Statements in plaintiff's affidavit as to why he "thinks" cartons of soft drinks in a grocery store display fell could not be considered in ruling on defendant's motion for summary judgment, the statements not being made on personal knowledge and plaintiff not having affirmatively shown that he was competent to give an opinion as to why the drinks fell. Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972).

**Parties Entitled to Any Presumption Applicable to Facts before Court.** — Upon a motion for summary judgment both the opposing and moving parties are entitled to any presumption that is applicable to the facts before the court. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Rule 6(d) Does Not Apply.** — Rule 6(d) provides that when a motion is supported by affidavit, the affidavit shall be served with the motion; however, in view of the express provisions of Rule 56, Rule 6(d) does not apply to affidavits presented in support of summary judgment. Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

**Rule 6(d) Does Apply.** — The provision of Rule 6(d), which requires that supporting affidavits be served with a motion, applies to affidavits in support of a motion for summary judgment. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**Millsaps v. Wilkes Contracting Co. Distinguished.** — See Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**Section (e) Presupposes Affidavits Already Served.** — Although section (e) grants to the trial court wide discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits, it presupposes that an affidavit or affidavits have already been served. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**But Failure to File Not Fatal If Burden under Section (c) Not Met.** — Defendants' failure to file affidavits in opposition to plaintiff's motion in section (e) was not fatal where plaintiff initially had not met the burden imposed by section (c) of showing the absence of a genuine issue of material fact. Shook Bldrs. Supply Co. v. Eastern Assocs., 24 N.C. App. 533, 211 S.E.2d 472 (1975).

**Supporting Affidavits Must Be Filed Sufficiently in Advance of Hearing.** — Under this section, by implication, affidavits supporting a motion for summary judgment must be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**And Not on Day of Hearing.** — This rule speaks only of supplementing or opposing. It does not intend to authorize filing, on the day of the hearing, the only affidavits supporting the motion for summary judgment. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

**Not All Affidavits Must Be Attached at Hearing.** — Section (e) does not have the effect of requiring that all affidavits offered at the hearing on a motion for summary judgment be attached to and served with the motion. Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

A motion for summary judgment may or may not be accompanied by affidavits. Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

**Opposing Affidavits May Be Served Prior to Hearing.** — The adverse party may serve opposing affidavits prior to the day of the hearing. Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

**There is a sound reason for the mandatory form in which the 10-day notice requirement is expressed** in this rule. Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Opposing Party Entitled to Opportunity to Develop Facts More Fully.** — The party opposing the motion is entitled to the opportunity, which compliance with the 10-day notice provision of this rule would provide, to develop the facts more fully. Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Judgment Reversed Where Notice Requirement Not Met.** — Because it was entered without prior notice of the motion as required by this rule, the summary judgment appealed from was reversed. Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Judgment Erroneous for Failure to Allow 10 Days' Notice.** — Where defendants failed to move for summary judgment and plaintiffs were not given at least 10 days' notice before the time fixed for the hearing, the failure to follow the procedure prescribed by this rule caused the judgment to be erroneous. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

**Ten-Day Requirement Held Not Waived.** — Where defendants' motion for summary judgment was not served on plaintiff "at least 10 days before the time fixed for the hearing" as required by this rule, but was made without any prior notice during the course of the pretrial hearing at which the summary judgment dismissing plaintiff's action was rendered, plaintiff's stipulation made at that hearing to the effect that his testimony and evidence "would be as set out in the complaint" did not constitute a waiver of the requirement of this rule that the motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Under section (c) the trial judge does not sit as fact finder** as is true under Rule 52. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

**Findings of Fact on Motion.** — Although a trial judge was not required to make and enter into the record detailed findings of fact in ruling on a motion for summary judgment, it was not error for the court to do so, where there was plenary evidence in the record to support his findings. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972).

There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976).

Findings of fact on summary judgment entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on appeal and are irrelevant to appeal decision. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

The action by the trial judge in making findings of fact was without error since his stated findings were merely a summary of the material facts not at issue which he thought justified entry of judgment. Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687 (1977).

**Hearing May Be Extended into Court Trial.** — If the summary judgment hearing is a protracted hearing, in effect a trial to determine that a trial must be held, and if all the parties desire to and do turn the summary judgment into a court trial, they cannot be heard to object. In that event the court should make findings of fact and conclusions of law in accordance with Rule 52. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

**Partial Summary Judgment.** — Section (d) of this rule clearly contemplates that summary judgment may be entered upon less than the whole case and that the court may make a summary adjudication that is not final. Unless the interlocutory order is appealable and in most instances it will not be, the court has rendered a "partial summary judgment" that is technically not a judgment. Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

Section (d) allows the trial court to grant a partial summary judgment. Hill Truck Rentals, Inc. v. Hubler Rentals, Inc., 26 N.C. App. 175, 215 S.E.2d 398 (1975).

**Denial of Motion Not Ordinarily Appealable.** — Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken, but the moving party is free to preserve his exception for consideration on appeal from the final judgment. To allow an appeal from a denial of a motion for summary judgment would open the floodgate of fragmentary appeals and cause a delay in administering justice. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970); Stonestreet v. Compton Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973).

The denial of a motion by a defendant for summary judgment has the same effect as the overruling of a demurrer, and thus falls within the purview of Rule 4 of the Rules of Practice in the Court of Appeals. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

A denial of a motion by a defendant for summary judgment has the same effect as the overruling of a demurrer, in that the movant has suffered no great harm as the trial continues, and the movant is allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

The Court of Appeals dismissed as fragmentary an appeal from a denial of a motion for summary judgment. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**But Certiorari Is Available Where Substantial Right Is Thought to Be Affected.** — In case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of certiorari is available. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Res Judicata.** — Matters determined by a summary judgment, just as by any other judgment, are res judicata in a subsequent action. T.A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972).

**Summary Judgment Is Reviewable When Right to Trial Denied.** — A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right by summary judgment is reviewable. Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971).

**If the plaintiff's claim is barred by the running of the statute of limitations,** defendant is entitled to judgment as a matter of law and summary judgment is appropriate. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**If the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial,** then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact. He need not, of course, show that the issue would be decided in his favor. But he may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

The test is whether the moving party, by affidavit or otherwise, presents materials which would require a directed verdict in his favor if presented at trial. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971).

**Where the parties were in agreement as to all the factual particulars** concerning the making and the terms of a loan, there was no "genuine issue as to any material fact," and the effect of the undisputed facts was a question of law for the court to determine. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

**Where the materials presented in support of defendant's motion for summary judgment showed that plaintiff had suffered no compensable injury** or damage, the entry of summary judgment was proper since there appeared to be no genuine issue as to any material fact. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

**Where the pleadings or proof of either party disclose that no cause of action or defense exists,** a summary judgment may be granted. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

Summary judgment is proper where it appears that even if the facts as claimed by a plaintiff are proved, there can be no recovery, thus providing a device for identifying the factually groundless claim or defense. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

**Defendant having admitted the contract and his failure to perform, plaintiff was entitled to summary judgment** unless the facts alleged in the further answer constitute a valid defense. Williford v. Williford, 10 N.C. App. 451, 179 S.E.2d 114, cert. denied, 278 N.C. 301, 180 S.E.2d 177 (1971).

**Where defendant denied the existence of the debt alleged,** unless his admissions clearly showed that his denial of the debt was utterly baseless in fact, defendant's denial raised a genuine issue as to a material fact. Commercial Credit Corp. v. McCorkle, 19 N.C. App. 397, 198 S.E.2d 736 (1973).

**Genuine Issue Shown.** — Evidence tending to show that insurer-defendants offered to pay for a loss and continually negotiated with the plaintiff as to the amount, and that the defendants repeatedly assured plaintiff that her claim would be paid, is sufficient to show that there is a genuine triable issue as to whether defendants waived the requirements of the insurance policy relating to filing formal proof of loss and institution of the action within 12 months. Pennell v. Security Ins. Co., 18 N.C. App. 465, 197 S.E.2d 240 (1973).

On the question of whether a genuine issue of fact exists on a motion for summary judgment, where the record indicates that the defendant used reasonable means to call to the attention of the plaintiff the limitation of liability clause upon which it relied, and no controversy as to the facts with reference to this question appears upon the record, there was no error in the treatment of the limitation of liability clause as part of the contract between the parties. Gas House, Inc. v. Southern Bell Tel. & Tel. Co., 289 N.C. 175, 221 S.E.2d 499 (1976).

**Genuine Issue Not Shown.** — Where the plaintiff had taken advantage of the discovery procedures available and had still been unable to obtain evidence as to when and how the injury occurred and who or what caused it and the record did not reveal that any injury in the nature of an inflicted harm occurred, and the condition of the plaintiff could just as well have been from a pathological cause, then there was an absence of a showing that there was a genuine issue as to any material fact and summary judgment was appropriate. Hoover v. Gaston Mem. Hosp., 11 N.C. App. 119, 180 S.E.2d 479 (1971).

There was no genuine issue as to any material fact in an action under an airplane insurance policy, where defendant insurance company effectively canceled the policy under the terms of the contract by notice to the plaintiff insured when plaintiff failed to make premium payments on time, where defendant had not waived the right of cancellation by past acceptance of late payments which conformed to the conditions of cancellation, and where tender or refund of the unearned portion of the premium payments was not a condition precedent to cancellation. Klein v. Avemco Ins. Co., 289 N.C. 63, 220 S.E.2d 595 (1975).

**Validity of the judgment does not depend upon the form** in which the determination is made, whether express or implied, but upon the correctness of the determination. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

**Summary Judgment Was Proper.** — Where plaintiffs did not file opposing affidavits or reasons why affidavits justifying their opposition to the summary judgment motion could not be presented, but rested instead on the mere allegations of their pleadings, summary judgment was properly entered for defendant based on the pleadings and on the deposition of plaintiffs. Doggett v. Welborn, 18 N.C. App. 105, 196 S.E.2d 36, cert. denied, 283 N.C. 665, 197 S.E.2d 873 (1973).

The summary judgment in favor of a land seller was correct where there was no contract in writing pertaining to the conveyance of the realty as required by § 22-2. Henry v. Shore, 18 N.C. App. 463, 197 S.E.2d 270 (1973).

Summary judgment dismissing plaintiff's action against defendant insurance company under an uninsured motorists endorsement to a policy was proper not because his contract action against defendant was barred, but because the admitted facts establish that at the time this action was instituted his claim for wrongful death was no longer within the coverage provided by the policy. Brown v. Lumbermens Mut. Cas. Co., 19 N.C. App. 391, 199 S.E.2d 42 (1973), aff'd, 285 N.C. 313, 204 S.E.2d 829 (1974).

In an action for specific performance of an option contract for sale of land, where plaintiff's affidavits and materials in support of their motion for summary judgment, if true, established that, upon tender of the deed, they were ready, willing and able to pay defendants cash for the property, there were only latent doubts as to the credibility of the affidavits, the affidavits of a disinterested bank president strongly corroborated plaintiffs' affidavits and financial statements, and defendants neither produced any contradictory affidavits, pointed to any specific grounds for impeachment, nor utilized section (f) of this rule, summary judgment against defendants decreeing specific performance was appropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

In an action to recover accidental death insurance proceeds, where defendant's evidentiary matter established that cause of death was due to heart failure and defendant's evidence was not contradicted by plaintiff in response to the motion for summary judgment, the motion was properly granted. Hicks v. Old Republic Life Ins. Co., 29 N.C. App. 561, 225 S.E.2d 164 (1976).

Where the moving party supported his motion for summary judgment by presenting an affidavit along with the pleadings, and the opposing parties failed to put forth any evidentiary matters in opposition to the motion, summary judgment was appropriate. Arnold v. Howard, 29 N.C. App. 570, 225 S.E.2d 149 (1976).

**Summary Judgment Improper.** — Defendants are not entitled to a judgment as a matter of law where the record does not clearly establish the inapplicability of the doctrine of res ipsa loquitur since the evidentiary materials tend to show that the water heater in question was under the exclusive control and management of the defendants; and explosion of a water heater does not ordinarily happen if those who have the management of it use proper care. Under those circumstances the explosion itself would be some evidence of negligence on the part of those in control and would tend to establish a prima facie case requiring its submission to the jury. Evidence tending to explain the cause of the explosion merely accentuates the jury's role in this controversy and the unwisdom of summary judgment. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972).

Where in an action to recover on a promissory note defendant's affidavit in support of her motion for summary judgment merely reiterated the allegations in her answer and where plaintiff's note verified the complaint, the evidence, when viewed in the light most favorable to the plaintiff, showed a triable issue did exist and defendant was not entitled to judgment as a matter of law. Liberty Loan Corp. v. Miller, 15 N.C. App. 745, 190 S.E.2d 672 (1972).

Where the trial judge's resolution against the plaintiffs of the the issue of fact as to whether or not they were in default in their payments under a deed of trust at the time of the foreclosure made it impossible for the plaintiffs to prevail and clearly affected the result of their action, there were genuine issues of material fact which could only be resolved by a trial of the action, and the summary judgment in favor of the defendants was reversed. Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972).

Defendant's evidence, taken in the light most favorable to him, established the execution of certain notes and security instruments accompanied by a prior or contemporaneous parol agreement as to the mode of payment and the fund from which it would be paid. The evidence tending to show a continued course of dealings pursuant to this oral agreement was sufficient to have affected the result of the action, thereby creating a conflict between plaintiff's evidence and defendant's evidence as to a material fact. A jury question was thus presented and the trial judge erred when he granted plaintiff's motion for summary judgment. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

**Applied** in Roten v. State, 8 N.C. App. 643, 175 S.E.2d 384 (1970); Lane v. Faust, 9 N.C. App. 427, 176 S.E.2d 381 (1970); Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970); Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); Williams v. Lewis, 11 N.C. App. 306, 181 S.E.2d 234 (1971); Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971); Allen v. Redevelopment Comm'n, 279 N.C. 599, 184 S.E.2d 233 (1971); Beasley v. Hartford Accident & Indem. Co., 280 N.C. 177, 184 S.E.2d 841 (1971); Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972); Skinner v. Whitley, 281 N.C. 476, 189 S.E.2d 230 (1972); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Appalachian South, Inc. v. Construction Mtg. Corp., 11 N.C. App. 651, 182 S.E.2d 15 (1971); Adams v. State Capital Life Ins. Co., 11 N.C. App. 678, 182 S.E.2d 250 (1971); Lane v. Faust, 11 N.C. App. 717, 182 S.E.2d 281 (1971); Peaseley v. Virginia Iron, Coal & Coke Co., 12 N.C. App. 226, 182 S.E.2d 810 (1971); Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971); Bradley v. Lewis Motors, Inc., 12 N.C. App. 685, 184 S.E.2d 397 (1971); Price v. Bunn, 13 N.C. App. 652, 187 S.E.2d 423 (1972); Cornatzer v. Nicks, 14 N.C. App. 152, 187 S.E.2d 385 (1972); Rivenbark v. Atlantic States Constr. Co., 14 N.C. App. 609, 188 S.E.2d 747 (1972); Employers Com. Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972); University of N.C. v. Town of Carrboro, 15 N.C. App. 501, 190 S.E.2d 231 (1972); Hansen v. Jonas W. Kessing Co., 15 N.C. App. 554, 190 S.E.2d 407 (1972); Taylor v. Wake Forest Univ., 16 N.C. App. 117, 191 S.E.2d 379 (1972); Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390 (1972); Reap v. City of Albemarle, 16 N.C. App. 171, 191 S.E.2d 373 (1972); Carolina Elec. Serv. of Henderson, Inc. v. Granger, 16 N.C. App. 427, 192 S.E.2d 19 (1972); Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972); Huffman v. Peerless Ins. Co., 17 N.C. App. 292, 193 S.E.2d 773 (1973); Planters Nat'l Bank & Trust Co. v. Rush, 17 N.C. App. 564, 195 S.E.2d 96 (1973); Harris v. Parker, 17 N.C. App. 606, 195 S.E.2d 121 (1973); Henry v. Henry, 18 N.C. App. 60, 196 S.E.2d 33 (1973); Randolph v. Schuyler, 18 N.C. App. 393, 197 S.E.2d 3 (1973); Newman Bros. v. Wind King Mfg. Co., 18 N.C. App. 613, 197 S.E.2d 809 (1973); Forsyth County v. York, 19 N.C. App. 361, 198 S.E.2d 770 (1973); Rossman v. New York Life Ins. Co., 19 N.C. App. 651, 199 S.E.2d 681 (1973); Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974); In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974); Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 21 N.C. App. 116, 203 S.E.2d 321 (1974); Bland v. Bland, 21 N.C. App. 192, 203 S.E.2d 639 (1974); Nelson v. Comer, 21 N.C. App. 636, 205 S.E.2d 537 (1974); Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974); Jenkins v. Coombs, 21 N.C. App. 683, 205 S.E.2d 728 (1974); Town of Wadesboro v. Holshouser, 22 N.C. App. 65, 205 S.E.2d 550 (1974); Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974); Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974); Harrell v. City of Winston-Salem, 22 N.C. App. 386, 206 S.E.2d 802 (1974); Estate of Loftin v. Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974); Peace v. Peace Broadcasting Corp., 22 N.C. App. 631, 207 S.E.2d 288 (1974); New River Crushed Stone, Inc. v. Austin Powder Co., 24 N.C. App. 285, 210 S.E.2d 285 (1974); Yount v. Lowe, 288 N.C. 90, 215 S.E.2d 563 (1975); Nytco Leasing, Inc. v. Dan-Cleve Corp., 25 N.C. App. 18, 212 S.E.2d 41 (1975); Sams v. Sargent, 25 N.C. App. 219, 212 S.E.2d 559 (1975); Sims v. Rea Constr. Co., 25 N.C. App. 472, 213 S.E.2d 398 (1975); Newton v. Williams, 25 N.C. App. 527, 214 S.E.2d 285 (1975); Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975); Dickerson, Inc. v. Board of Transp., 26 N.C. App. 319, 215 S.E.2d 870 (1975); In re Will of Edgerton, 26 N.C. App. 471, 216 S.E.2d 476 (1975); Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 219 S.E.2d 242 (1975); Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); United States Steel Corp. v. Lassiter, 28 N.C. App. 406, 221 S.E.2d 92 (1976); Pritchett v. Thompson, 28 N.C. App. 458, 221 S.E.2d 757 (1976); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976); Currituck Grain, Inc. v. Powell, 28 N.C. App. 563, 222 S.E.2d 1 (1976); Gibson v. Campbell, 28 N.C. App. 653, 222 S.E.2d 449 (1976); Pinkston v. Baldwin, Lima, Hamilton Co., 29 N.C. App. 604, 225 S.E.2d 147 (1976); Price v. Horn, 30 N.C. App. 10, 226 S.E.2d 165 (1976); Phil Mechanic Constr. Co. v. Gibson, 30 N.C. App. 385, 226 S.E.2d 837 (1976); Gardner Homes, Inc. v. Gaither, 31 N.C. App. 118, 228 S.E.2d 525 (1976); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976); Burkette v. Georgia Int'l Life Ins. Co., 32 N.C. App. 464, 232 S.E.2d 490 (1977); Carter v. Georgia Life & Health Ins. Co., 32 N.C. App. 580, 233 S.E.2d 65 (1977); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

**Quoted** in Moore v. Bryson, 11 N.C. App. 149, 180 S.E.2d 437 (1971); Raynor v. Mutual of Omaha, 24 N.C. App. 573, 211 S.E.2d 458 (1975).

**Cited** in Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970); Jernigan v. Lee, 9 N.C. App. 582, 176 S.E.2d 899 (1970); Beasley v. Hartford Accident & Indem. Co., 11 N.C. App. 34, 180 S.E.2d 381 (1971); Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971); Yancey v. Watkins, 12 N.C. App. 140, 182 S.E.2d 605 (1971); Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722 (1972); Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972); Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972); Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Roth v. Parsons, 16 N.C. App. 646, 192 S.E.2d 659 (1972); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); United Artists Record, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973); George W. Shipp Travel Agency, Inc. v. Dunn, 20 N.C. App. 706, 202 S.E.2d 812 (1974); Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230 (1974); Board of Transp. v. Harrison, 22 N.C. App. 193, 205 S.E.2d 751 (1974); Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975); Hayman v. Ross, 22 N.C. App. 624, 207 S.E.2d 348 (1974); Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974); Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976); State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977); Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977); Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286 (1977); Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977).

## Rule 57. Declaratory judgments.

**Basic Statutory Provisions Retained.** — The basic statutory provisions for obtaining declaratory judgments have been retained. This rule simply provides that the procedure for this remedy shall be in accordance with the new Rules of Civil Procedure. Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972), rev'd on other grounds, 282 N.C. 559, 194 S.E.2d 129 (1973).

**Applied** in Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976).

**Quoted** in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Cited** in Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977).

## Rule 58. Entry of judgment.

**Objectives of Rule.** — This rule is designed to achieve the objectives of (1) making the moment of the entry of judgment easily identifiable, and (2) furnishing fair notice to all parties of the entry of the judgment. Barringer & Gaither, Inc. v. Whittenton, 22 N.C. App. 316, 206 S.E.2d 301 (1974).

The objectives of this rule are to make the moment of entry of judgment easily identifiable and to give fair notice to all parties. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

**This rule has no application to a confession of judgment.** Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

**Application of Third Paragraph.** — The third paragraph of this rule applies to instances where the trial judge directs the clerk to prepare and file judgment. It is inapplicable when the trial judge prepares and signs the judgment. Barringer & Gaither, Inc. v. Whittenton, 22 N.C. App. 316, 206 S.E.2d 301 (1974).

**Under this rule there are three requirements** necessary for the entry of judgments which are not rendered in open court. First, an order for the entry of judgment must be given to the clerk by the judge. Second, the judgment must be filed. Third, the clerk must mail notice to all parties, and entry of judgment is deemed to have been made at the time of the mailing of the notice. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

**Evidence of Mailing.** — The clerk's notation on the judgment of the time of the mailing is prima facie evidence of the mailing and time of the mailing. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

**Effective notice of the filing of the judgment was afforded** to defendants by the mailing to counsel of a true copy of the judgment. Barringer & Gaither, Inc. v. Whittenton, 22 N.C. App. 316, 206 S.E.2d 301 (1974).

**Applied** in Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

**Cited** in Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

## Rule 59. New trials; amendment of judgments.

**Rule 59 of the Federal Rules of Civil Procedure is comparable to this rule.** Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**The repeal of § 1-207 (1953) did not diminish the trial judge's traditional discretionary authority to set aside a verdict.** The procedure for exercising this traditional power was merely formalized in this section, which lists eight specific grounds and one "catch-all" ground found in subsection (a)(9) on which the judge may grant a new trial. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

**A motion to set aside the verdict and for a new trial is addressed to the sound discretion of the trial judge,** whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970); Mangum v. Surles, 12 N.C. App. 547, 183 S.E.2d 839 (1971), rev'd on other grounds, 281 N.C. 91, 187 S.E.2d 697 (1972); City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

A timely motion for new trial is addressed to the sound judicial discretion of the trial court. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

Where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court and its ruling is not subject to review in the absence of an abuse of discretion. In re Will of Herring, 19 N.C. App. 357, 198 S.E.2d 737 (1973).

A motion for new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion. State v. Hammock, 25 N.C. App.

97, 212 S.E.2d 180, cert. denied, 287 N.C. 262, 214 S.E.2d 435, cert. denied, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975).

This section provides wide latitude for the trial judge to award new trials, and it does not require that he set out grounds to support his order. Philco Fin. Corp. v. Mitchell, 26 N.C. App. 264, 215 S.E.2d 823 (1975).

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court and refusal to grant the motion is not reviewable in the absence of abuse of discretion. State v. Gleason, 27 N.C. App. 587, 219 S.E.2d 350 (1975).

**Trial Court Properly Exercised Discretion.** — City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

**The trial judge has discretionary power to set aside an award of damages** if he believes that the damages were excessive and given under the influence of passion or prejudice, or if the evidence is insufficient to justify the verdict. A ruling that is within the discretion of a trial judge may not be set aside except upon a showing of abuse of discretion. Samons v. Meymandi, 9 N.C. App. 490, 177 S.E.2d 209 (1970), cert. denied, 277 N.C. 458, 178 S.E.2d 225 (1972).

A motion for new trial on the grounds of inadequate damages is addressed to the discretion of the trial judge. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976).

**The trial judge is vested with the discretionary authority to set aside a verdict** and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

**The practice of remittitur with the successful party's consent is still permissible** in our courts under this rule. Redevelopment Comm'n v. Holman, 30 N.C. App. 395, 226 S.E.2d 848, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

**Constitutionality of Remittitur.** — See Redevelopment Comm'n v. Holman, 30 N.C. App. 395, 226 S.E.2d 848, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

**Court Not Empowered, etc.** —

In accord with original. See Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

**Court Need Not Specify Grounds for Order Allowing Litigant's Motion.** — The trial court is not required to specify the grounds for its order allowing a litigant's motion to set aside a verdict and grant a new trial, where the order is not entered on the trial court's own initiative. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**Where Trial Court Did Not Specify Errors on Which Order for New Trial Based.** — Although the appellate court would usually reverse the order for a new trial for errors of law committed at trial and remand the case for entry of judgment on the verdict rendered where the trial court did not specify the errors upon which his action was based, where the ends of justice require, the appellate court will order the verdict rendered to be set aside and a new trial had, to the end that the whole case may be properly developed on a new trial in accordance with the usual course and practice. In re Will of Herring, 19 N.C. App. 357, 198 S.E.2d 737 (1973).

**When Decision as to New Trial May Be Appealed.** — When a judge presiding at a trial grants or refuses to grant a new trial because of some question of law or legal inference which the judge decides, the decision may be appealed and the appellate court will review it. In re Will of Herring, 19 N.C. App. 357, 198 S.E.2d 737 (1973).

Since a motion to set aside a verdict as contrary to the greater weight of the credible testimony requires the trial judge's appraisal of the testimony, it necessarily invokes the exercise of his discretion. It raises no question of law, and his ruling thereon is irreviewable in the absence of manifest abuse of discretion. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

When a jury's verdict exceeds the evidence, the decision to grant a new trial is in the discretion of the trial judge, and the appellate court will review the trial judge only if it appears he grossly abused his discretion. Redevelopment Comm'n v. Holman, 30 N.C. App. 395, 226 S.E.2d 848, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

When a verdict is set aside for error in law, the decision is not a matter of discretion. In such a situation, the aggrieved party may appeal, provided the error is specifically designated. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

**Appeal Divests Trial Court of Jurisdiction.** — The general rule that an appeal takes the case out of the jurisdiction of the trial court is not changed by Rule 60 and this rule. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

When an appeal is taken the trial court is divested of jurisdiction except to aid in certifying a correct record. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

A trial court has no jurisdiction to enter an order granting defendant a new trial while an appeal of the cause is pending. Jim Walter Homes, Inc. v. Peartree, 24 N.C. App. 579, 211 S.E.2d 457, cert. denied, 286 N.C. 722, 213 S.E.2d 722 (1975).

The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by this rule or Rule 60. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

**Purpose of Amendments after Judgment.** — The rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under Rule 15(a), by pretrial order under Rule 16, during and after reception of evidence under Rule 15(b), and after entry of judgment under Rules 15(b), 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**Trial Judge Must Rule on Alternative Motion for New Trial.** — Where defendant makes a motion for judgment notwithstanding the verdict and joins with this motion an alternative motion for a new trial, in granting the motion for judgment notwithstanding the verdict, the trial judge should also rule on the motion for a new trial. Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

**And a party must appeal conditionally from an adverse ruling thereon.** Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

**Partial New Trial Granted.** — Where the error in the charge of the court related only to the measure of damages recoverable by the plaintiff and had no bearing upon the jury's determination of the negligence of the defendant as the proximate cause of the plaintiff's injury, only a partial new trial will be granted. Brown v. Neal, 283 N.C. 604, 197 S.E.2d 505 (1973).

**Applied** in Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976).

**Quoted** in State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316 (1974).

**Stated** in H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973).

**Cited** in Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970); Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Robertson v. Stanley, 285 N.C. 561, 206 S.E.2d 190 (1974); Foy v. Bremson, 286 N.C. 108, 209 S.E.2d 439 (1974); Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977).

## Rule 60. Relief from judgment or order.

### I. IN GENERAL.

**Federal Rule Nearly Identical.** — The nearly identical provisions of section (b) of this rule and federal Rule 60(b) point to the federal decisions for interpretation and enlightenment. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

Section (b) of this rule is nearly identical to federal Rule 60(b). Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

**This rule replaces former § 1-220.** Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974).

**And the cases interpreting former § 1-220 are still applicable.** Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974).

**The provisions of former § 1-220 are now incorporated in this rule.** Williams Lumber Co. v. Taylor, 8 N.C. App. 255, 174 S.E.2d 109 (1970).

**The procedure under section (b) is analogous to the former practice** under former § 1-220 and under motions to set aside an irregular judgment. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

**Section (a) simply codifies the body of law in existence** in this State at the time the new Rules of Civil Procedure were adopted. H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973).

**The trial court has inherent power to amend judgments by correcting clerical errors or supplying defects** so as to make the record speak the truth. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

**The correction of clerical errors is not limited to the term of court,** but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

**Authority of Courts to Correct Error in Decision or Amend Judgment.** — While courts have always had the inherent authority to correct clerical errors or errors of expression in a judgment, they have never been deemed to have the authority, outside of a term, to correct an error in decision, or to amend a judgment so as to adversely affect the rights of third parties. H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Vandooren v. Vandooren, 27 N.C. App. 279, 218 S.E.2d 715 (1975).

Section (a) does not authorize the trial court to set aside a previous ruling where the basis is a legal error. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

The power to correct clerical errors after the lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

The power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

**Section (b) has been described as a grand reservoir of equitable power** to do justice in a particular case. Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

**No Application to Interlocutory Judgments.** — Section (b) of this rule has no application to interlocutory judgments, orders or proceedings of the trial court. It only applies, by its express terms, to final judgments. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

**Party or Legal Representative May Seek Relief.** — Under this rule, a party or his legal representative may seek relief from a final judgment. Browne v. Catawba County Dep't of Social Servs., 22 N.C. App. 476, 206 S.E.2d 792 (1974).

**Purpose of Amendment after Judgment.** — The rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under Rule 15(a), by pretrial order under Rule 16, during and after reception of evidence under Rule 15(b), and after entry of judgment under Rules 15(b), 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

**Excusable Neglect, etc.** —

In accord with 1st paragraph in original. See U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

In order to vacate a judgment there must be both excusable neglect and a meritorious defense. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

It is the duty of the judge presiding at the hearing on the motion to make findings of fact and upon those facts to determine as a matter of law whether there is a showing of excusable neglect and of a meritorious defense. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Even in situations when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless the defendant has a meritorious defense. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Unless the judge finds that there was excusable neglect, and this finding is correct as a matter of law, he is not authorized to set aside the judgment. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Where the facts found in an order setting aside a default judgment did not, as a matter of law, constitute excusable neglect, and the defendant failed to show and there was no finding that he had any meritorious defense, the order was erroneous. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

**Excusable Neglect Has Long Been Recognized.** — Although the ground of excusable neglect is set forth in this rule, it has long been recognized in this jurisdiction and the Supreme Court has spoken on the subject many times. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered.** Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

**Relief Will Not Be Granted Where Neglect Is Inexcusable.** — The exceptional relief of this rule (replacing former § 1-220) to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant. A lawsuit is a serious matter. He who is a party to a case in court "must give it that attention which a prudent man gives to his important business." Holcombe v. Bowman, 8 N.C. App. 673, 174 S.E.2d 362 (1970).

**Meritorious Defense, etc.** —

Even when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless there is a meritorious defense, for it would be idle to vacate a judgment where there is no real or substantial defense on the merits. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Even if there is evidence from which a finding of excusable neglect can be made, case law requires a finding of a meritorious defense before the judgment may be set aside. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

While this rule gives the court ample power to vacate a judgment whenever that action is appropriate to accomplish justice, a judge cannot do so without a showing based on competent evidence that justice requires it. Highfill v.

Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

At the hearing on the motion to set aside a judgment it is not necessary that a meritorious defense be proved, but only that a prima facie defense exists. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

**Whether the neglect is excusable, etc. —** In accord with 2nd paragraph in original. See Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

The excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

**Determination by Court. —** Whether excusable neglect has been shown is a question of law, not a question of fact. Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972).

Upon the facts found the court determines, as a matter of law, whether or not they constitute excusable neglect. Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972).

Determination of whether excusable neglect, inadvertence, or surprise has been shown is a question of law, not a question of fact. Mason v. Mason, 22 N.C. App. 494, 206 S.E.2d 764 (1974).

**Consent Judgment. —** A consent judgment cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment. Blankenship v. Price, 27 N.C. App. 20, 217 S.E.2d 709 (1975).

**The results of a new physical examination** were not "newly discovered evidence" which would allow reopening a judgment and granting a new trial under section (b). Grupen v. Thomasville Furn. Indus., 28 N.C. App. 119, 220 S.E.2d 201 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 696 (1976).

**Relief from Execution Sale. —** A motion in the cause is not an improper procedure for seeking relief from an execution sale under the judgment. Witten Supply Co. v. Redmond, 11 N.C. App. 173, 180 S.E.2d 487 (1971).

**Attention Required, etc. —** In accord with original. See Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971); Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974).

Judgment should not be set aside because present counsel was not made aware of the prior action until after summary judgment was rendered. It is inconceivable that plaintiff was unaware of the prior action since it was instituted in his behalf and by counsel retained by him. Plaintiff's failure to apprise his counsel of the prior action is not the attention to his litigation required by our prior decisions. Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

**The client may not abandon his case on employment of counsel. —** The lawyer employed must be reputable, skilled and competent. The client must impart to him facts constituting his defense. However, the mere employment of counsel is not enough. The client may not abandon his case on employment of counsel and when he has a case in court he must attend to it. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

**Findings Not Sufficient to Support Order Setting Aside Final Judgment. —** See Mason v. Mason, 22 N.C. App. 494, 206 S.E.2d 764 (1974).

**Absence from Record of Evidence to Support Findings of Fact. —** See Mason v. Mason, 22 N.C. App. 494, 206 S.E.2d 764 (1974).

**Applied** in Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Lowe's Charlotte Hdwe., Inc. v. Howard, 18 N.C. App. 80, 196 S.E.2d 53 (1973); Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973); Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974); Broughton v. Broughton, 22 N.C. App. 233, 206 S.E.2d 302 (1974); Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702 (1975); Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975); Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976); Stokley v. Stokley, 30 N.C. App. 351, 227 S.E.2d 131 (1976); Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976); Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

**Stated** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Cited** in Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); East v. Smith, 11 N.C. App. 604, 182 S.E.2d 266 (1971); State v. Blalock, 13 N.C. App. 711, 187 S.E.2d 404 (1972); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1972); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976); Carl Rose & Sons Ready Mix Concrete v. Thorp Sales Corp., 30 N.C. App. 526, 227 S.E.2d 301 (1976); Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977); Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977); Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977).

## II. THE RELIEF.

**Relief under Section (b), etc. —**

A motion for relief under section (b) is addressed to the sound discretion of the trial court. Burwell v. Wilkerson, 30 N.C. App. 110, 226 S.E.2d 220 (1976).

**Modification by One Judge, etc. —**

A superior court judge did have authority, upon motion under this rule, to set aside an order entered in another superior court where that order was entered without power and authority and was a nullity. Charleston Capital Corp. v. Love Valley Enterprises, Inc., 10 N.C. App. 519, 179 S.E.2d 190 (1971).

If a judge of a superior court enters an order without legal power to act in respect to the matter, such order is a nullity, and another superior court judge may disregard it without offending the rule which precludes one superior court judge from reviewing the decision of another. Charleston Capital Corp. v. Love Valley Enterprises, Inc., 10 N.C. App. 519, 179 S.E.2d 190 (1971).

## III. APPLICATION OF THE PRINCIPLES.

### A. Neglect of Party.

**The test of the negligence of the client or party** is whether he has acted as a man of ordinary prudence while engaged in transacting important business. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

The standard of care required of the litigant in his participation in a lawsuit is that which a man of ordinary prudence usually bestows on his important business. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

**Burden of Proof as to Negligence of Party.** — See Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148 (1976).

**For the personal inattention, etc. —**

While inattention and neglect of a person are attributed to the similarity in the title of a case to a former action, and to his preoccupation in the duties of his profession, this should not be held in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his inattention, as against diligent suitors. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Party under Physical and Mental Strain.** — An affidavit stating that as a result of certain duties an affiant was under tremendous physical and mental strain at the time he was served with a summons and complaint and for several weeks thereafter, is insufficient to support an order setting aside a default judgment on the ground of excusable neglect. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Wife's neglect to file, etc. —**

A wife's failure or neglect to file answer in a suit against her and her husband, upon assurances by her husband that he will be responsible for and assume that defense of the action, is excusable neglect. Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974).

**Prior Action Is Not Newly Discovered Evidence.** — The existence of the prior action is not newly discovered evidence which by due diligence could not have been discovered. To say plaintiff was unaware of an action instituted by him would be ludicrous. Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

### B. Neglect of Counsel.

**Where Negligence, etc. —**

The neglect of the attorney will not be imputed to the litigant unless he is guilty of inexcusable neglect. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971).

Ordinarily a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Where the trial court expressly found that defendant was diligent in communicating with his attorneys and providing them with information necessary to prepare answer, and that the neglect of the attorneys in failing to file answer within apt time was both excusable and was not to be imputed to defendant, these findings, coupled with the court's finding that defendant has a meritorious defense, fully support the order setting aside a judgment of default for excusable neglect. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

When the client employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

The attorney employed must be one licensed to practice in this State, and his negligence on which the prayer for relief from a default judgment is predicated must have been some failure in the performance of professional duties which occurred prior to and was the cause of the judgment sought to be vacated. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

### IV. PLEADING AND PRACTICE.

**Motions under section (b) must be made within a reasonable time.** Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

**Where Movant Is Uncertain Whether to Proceed under Clause (1) or (6) of Section (b).** — When the motion is based on reason (1) of section (b) the rule requires it to be made not later than one year after the judgment is taken or entered. If movant is uncertain whether to proceed under clause (1) or (6) of section (b) he need not specify if his motion is timely and the reason justifies relief. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

**Power of Court under Clause (6) of Section (b).** — The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

While subsection (b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice, a judge cannot do so without a showing based on competent evidence that justice requires it. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

**Motions under subsection (b)(6) are not to be used as a substitute for appeal,** and an erroneous judgment cannot be attacked under this clause. Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977).

**A motion for involuntary dismissal pursuant to this rule and Rule 41, prior to a trial of the cause,** is improperly entertained, unless made on the specific grounds that the plaintiff has failed to prosecute or comply with the Rules of Civil Procedure or any order of the court. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

**Any reference to or discussion of this rule by defendant in his motion under Rule 55(d)** to set aside and vacate entry of default is unnecessary and surplusage. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

**Written Motion to Set Aside Default Judgment Not Heard Ex Parte.** — Defendant's written motion to set aside a default judgment is not one which might be heard ex parte. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

**A new judge can hear a party's motion for rehearing to set aside a judgment,** provided that such is proper and authorized by this section. Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977).

**Court May Act Otherwise than "on Motion".** — Although this rule says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

**Effect of Pending Appeal.** — Although section (a) of this rule specifically permits the trial court to correct clerical mistakes before the appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court, section (b) is silent on the question. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

**Questions Reviewable on Appeal.** —

The trial judge's findings of fact are conclusive on appeal when supported by competent evidence, but, the conclusions of law made by the judge upon the facts found are reviewable on appeal. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

**Discretion of Judge Not Reviewable on Appeal — Abuse of Discretionary Power.** —

A motion for relief under section (b) of this rule is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Appellate review of a motion under section (b) is limited to determining whether the trial court abused its discretion. Burwell v. Wilkerson, 30 N.C. App. 110, 226 S.E.2d 220 (1976).

**Findings of Trial Court Conclusive.** —

The facts found by the judge are conclusive if there is any evidence on which to base such finding of fact. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

**The conclusions of law made by the judge upon the facts found by him are reviewable** on appeal. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

Whether the facts found constitute excusable neglect or not is a matter of law and reviewable upon appeal. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

The conclusion reached as to whether excusable neglect, inadvertence, or surprise has been shown is final unless exception is made that there was no evidence to support the findings of fact or that there was a failure to find sufficient material facts to support the conclusion. Mason v. Mason, 22 N.C. App. 494, 206 S.E.2d 764 (1974).

**Court of Appeals May Entertain Motion.** — A motion under this rule to set aside the judgment and for a new trial on the ground that a witness for plaintiff had perjured himself, which was filed after the appeal had been scheduled for argument, was properly made in the Court of Appeals. Rhodes v. Henderson, 14 N.C. App. 404, 188 S.E.2d 565 (1972).

**Appeal Divests Trial Court of Jurisdiction.** — The general rule that an appeal takes the case out of the jurisdiction of the trial court is not changed by Rule 59 and this rule. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by this rule or Rule 59. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

When an appeal is taken the trial court is divested of jurisdiction except to aid in certifying a correct record. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

## Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay; exceptions — injunctions, summary ejectment and receiverships.* — Except in summary ejectment cases and as otherwise stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of section (c) govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.
(1973, c. 91.)

**Editor's Note.** — The 1973 amendment substituted "Except in summary ejectment cases and as otherwise stated herein" for "Except as stated herein" at the beginning of section (a).

As the rest of this rule was not changed by the amendment, only section (a) is set out.

**Inapplicability to Summary Ejectment Pursuant to § 7A-232.** — See opinion of Attorney General to Mr. Alton J. Knight, Clerk of Superior Court, Durham County, 40 N.C.A.G. 529 (1970).

**Inapplicable for Issuance of Execution.** — See opinion of Attorney General to Mr. James R. Sugg, 41 N.C.A.G. 368 (1971).

**The granting or refusing an order for the appointment of a receiver** is not a mere matter of discretion in the judge, and either party dissatisfied with his ruling may have it reviewed. Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

**Applied** in Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977).

**Stated** in Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

**Cited** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

## Rule 63. Disability of a judge.

**Substitute Judge Functions Only after Verdict.** — Under this rule an appropriate judge may substitute for a disabled or a deceased judge before whom an action has been tried, only with respect to duties remaining to be performed after a verdict has been returned or findings of fact and conclusions of law have been filed. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

This rule does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process; it contemplates only that he may perform such acts as are necessary under the rules of procedure to effectuate a decision already made. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

**Findings and Conclusions Insufficient to Support Judgment by Substitute.** — Where, at the conclusion of the evidence in an action tried before the court without a jury, the trial judge orally indicated answers in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial, and instructed plaintiff's counsel to submit a proposed judgment containing appropriate findings of fact and conclusions of law, the issues and the court's answers thereto constituted neither a verdict nor findings of fact and conclusions of law which would permit a substitute judge to proceed under this rule to enter judgment in the case. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

## ARTICLE 8.

## *Miscellaneous.*

## Rule 65. Injunctions.

**Section (b) is constitutional.** Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

**Rule 3 and section (b) of this rule must be construed in pari materia;** procedure under section (b) of this rule is permissible only after an action is commenced as provided by Rule 3. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

**Governmental Immunity Not Abrogated by Section (c).** — See Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

Article IV, § 13(2) of the State Constitution would require a direct and positive declaration of policy, rather than a minute procedural change in this rule to abolish governmental immunity. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

**Distinction between Prohibitory and Mandatory Injunctions.** — The law recognizes a distinction between prohibitory and mandatory injunctions. A prohibitory injunction seeks to preserve the status quo, until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts. A mandatory injunction is intended to restore a status quo and to that end requires a party to perform a positive act; it is comparable in its nature and function to a writ of mandamus, and will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

**Decree May Be Both Preventive and Mandatory.** — While in the greater number of instances injunction is a preventive remedy, the court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear; and, if necessary to meet the exigencies of a particular situation, the injunctive decree may be both preventive and mandatory. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

**Purpose of a preliminary injunction** is to preserve the status quo pending trial on the merits. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

Purpose of an interlocutory injunction is to preserve the status quo of the subject matter involved until a trial can be had on the merits. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**A "temporary restraining order" and a "preliminary injunction" serve the same function.** Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**Preliminary injunction, unlike a temporary restraining order, requires notice** to the adverse party and a hearing. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

**A preliminary or interlocutory injunction** can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf, and usually is not for a fixed, limited period of time, since ordinarily its purpose is to preserve the status quo until the issues are adjudged after a final hearing. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**The ex parte restraining order** is subject to definite time limitations, and is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**The decision of the trial judge to grant or deny a preliminary injunction rests in his sound judgment and discretion.** Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

To issue or to refuse to issue an interlocutory injunction is usually a matter of discretion to be exercised by the trial court. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Burden is on plaintiffs to establish their right to preliminary injunction.** Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975); Waff Bros. v. Bank of N.C., N.A., 25 N.C. App. 517, 214 S.E.2d 261 (1975), rev'd on other grounds, 289 N.C. 198, 221 S.E.2d 273 (1976); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Grounds for Temporary Injunction.** — A temporary injunction will ordinarily be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's rights. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

Ordinarily, to justify the issuance of a preliminary injunction it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975); Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975); Waff Bros. v. Bank of N.C., N.A., 25 N.C. App. 517, 214 S.E.2d 261 (1975), rev'd on other grounds, 289 N.C. 198, 221 S.E.2d 273 (1976); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Temporary restraining order is not predicated upon illusory injury, loss, or damage,** but is entered only upon a showing of immediate and irreparable injury, loss, or damage. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

**Determination of Relative Conveniences and Inconveniences.** — Where a serious question exists the hearing judge considers the relative conveniences and inconveniences of the parties in determining the propriety of a preliminary injunction and the terms thereof if granted. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

**The prayer for relief in a complaint may constitute a sufficient motion** for a preliminary injunction, and a separate or additional motion is not necessarily required. Collins v. Freeland, 12 N.C. App. 560, 183 S.E.2d 831 (1971).

**And Complaint Need Not Use Technical Language.** — Although the wording of the prayer for relief in a complaint and the wording in the notice to show cause did not technically follow the language of this rule, the meaning was clear and unambiguous and sufficient to constitute a motion for a preliminary injunction. Collins v. Freeland, 12 N.C. App. 560, 183 S.E.2d 831 (1971).

**Court May Consider Affidavits.** — Both before and after the adoption of the new Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of § 1-485 does not prohibit this. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of § 1-485 for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

**Application of Section (d).** — Section (d) of this rule applies only to injunctions and restraining orders, not to contempt orders. R.E. Uptegraff Mfg. Co. v. International Union of Elec. Workers Local 189, 20 N.C. App. 544, 202 S.E.2d 309, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974).

**Reason for Issuance Correctly Set Out in Order.** — When an order provides that it is issued by consent of the parties, it correctly sets forth the reason for its issuance within the meaning of section (d) of this rule. R.E. Uptegraff Mfg. Co. v. International Union of Elec. Workers Local 189, 20 N.C. App. 544, 202 S.E.2d 309, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974).

**There is no statute that requires the court to make findings of fact and conclusions of law** in granting or denying a preliminary injunction under this rule. Hence, absent a request by a party that the court make findings of fact and conclusions of law, the court is required to state only the reasons for its issuance. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Necessity for Detailed Order.** — The third mandate of this rule, that an order set forth in reasonable detail the acts enjoined, involves the question of whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

Reference to some other document within a temporary restraining order is not sufficient to provide a description of the act or acts enjoined or restrained. Gibson v. Cline, 28 N.C. App. 657, 222 S.E.2d 478 (1976).

**Order Sufficiently Detailed.** — Where the allegedly ambiguous terms used by the court in the injunctive order are the exact words used in defendant's letter or the contract under which the parties functioned, apparently without complaint, for more than three years, defendant cannot insist that the court speak with more clarity than did plaintiff and defendant in establishing the relationship which the court seeks to preserve, especially when no showing is made as to any previous difficulty on the part of either party in understanding the language used. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

**Scope of Review of Injunctive Orders.** — In reviewing orders for temporary injunctive relief an appellate court may look beyond the findings of fact made by the trial court and determine from the evidence whether a preliminary injunction is justified. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

**Remedies Available to Party Wrongfully Restrained.** — When a temporary restraining order is dissolved as having been improvidently issued the remedies available to the party who has been wrongfully restrained are as follows: (1) He may recover damages from the party who procured the restraining order and the sureties on his injunction bond without proof of malice or want of probable cause, or (2) he may institute an action for malicious prosecution against the party who procured the restraining order and recover damages without regard to the limit of the bond upon establishing the elements necessary to constitute an action for malicious prosecution. Electrical Workers Local 755 v. Country Club E., Inc., 283 N.C. 1, 194 S.E.2d 848 (1973).

**Injunction without Notice Was Improper.** — While a specific request in the pleadings was not necessary under Rule 54(c), where there was no motion for or notice given of a hearing on a motion for a restraining order to enjoin the plaintiffs from using or attempting to use a dirt road, it was improper for the court to enter a permanent injunction. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

**Applied** In Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970); Register v. Griffin, 10 N.C. App. 191, 178 S.E.2d 95 (1970); State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236 (1973).

**Cited** in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976).

## Rule 68. Offer of judgment and disclaimer.

**Applied** in Shanahan v. Shelby Mut. Ins. Co., 19 N.C. App. 143, 198 S.E.2d 47 (1973).

**Quoted** in Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

## Rule 68.1. Confession of judgment.

**They are in derogation of common right, etc.** —

A statute authorizing confession of judgment is in derogation of the common law and is to be strictly construed. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

**Confession Is Consent Judgment.** — A confession of judgment without action is a consent judgment. The judgment depends upon the consent of the parties, and the court gives effect to it as the agreement of the parties. It would not be valid unless the parties consented, nor could it affect one who was not a party. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972); Yarborough v. Yarborough, 27 N.C. App. 100, 218 S.E.2d 411, cert. denied, 288 N.C. 734, 220 S.E.2d 353 (1975).

**And Judgment Depends upon Capacity to Contract.** — Since the validity of a confession of judgment is based upon the contract of the parties, there must be the authority and capacity to contract. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

**Written Authorization Required.** — There can be no entry of a confession of judgment, under this rule, without a written authorization for entry by the defendant, and defendant is therefore deemed to have notice since without a written statement by defendant authorizing its entry there can be no confession of judgment. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

**Express or Implied Consent.** — In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto. Yarborough v. Yarborough, 27 N.C. App. 100, 218 S.E.2d 411, cert. denied, 288 N.C. 734, 220 S.E.2d 353 (1975).

**The clerk of superior court is not authorized to enter judgment by confession which determines custody of minor children.** — See opinion of Attorney General to The Honorable Martha J. Adams, Clerk of Superior Court, Alexander County, 46 N.C.A.G. 168 (1977).

**Minor Parties Cannot Be Bound without Court Investigation and Approval.** — In the case of infant parties, the next friend, guardian ad litem or guardian cannot consent to a judgment or compromise without the investigation and approval by the court. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

A judgment or compromise settlement negotiated by a next friend or guardian without the investigation and approval of the court is invalid. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

A confession of judgment and subsequent clerical entries were ineffective to bind a minor plaintiff in the absence of the requisite investigation and approval by the court. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

An instrument in the nature of an offer by the defendants to the plaintiff to settle plaintiff's claim for a lesser amount than was claimed to be due could not bind the minor plaintiff unless accepted on his behalf by someone authorized and empowered by law to do so. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

Due to the absence in the record on appeal of anything to disclose an investigation and approval by the court, a purported judgment in favor of a minor plaintiff was a nullity and its purported cancellation by his guardian was of no effect. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

**Defendant was estopped, etc.** —

Where a husband ratifies, accepts, or acquiesces in a decree of alimony by confession, he is estopped, in the absence of a showing of fraud, mistake or oppression, to challenge the validity of the judgment on the grounds of informalities or irregularities in either the confession of judgment or the decree itself. Whitehead v. Whitehead, 13 N.C. App. 393, 185 S.E.2d 706 (1972).

## Rule 70. Judgment for specific acts; vesting title.

**Applied** in Elliott v. Burton, 19 N.C. App. 291, 198 S.E.2d 489 (1973).

**Cited** in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975); Newton v. Williams, 25 N.C. App. 527, 214 S.E.2d 285 (1975); Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500 (1975); Price v. Horn, 30 N.C. App. 10, 226 S.E.2d 165 (1976).

## Rule 84. Forms.

**Language Describing Forms Is Identical to That of Federal Rule.** — This rule declares that Forms 3 and 4 and all the other forms of complaint incorporated therein are "sufficient under these rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." This language is identical to that of federal Rule 84. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Forms 3 and 4 illustrate the sufficient form of a complaint for negligence.** Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 405, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

**Specific Allegations Necessary in Forms (3) and (4).** — The North Carolina pleadings and forms differ from the federal pleadings and forms in that federal Forms 9 and 10, complaints for negligence, do not require specific allegations of acts of negligence. Under this rule, Forms (3) and (4) do require such specific allegations. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

They contain much more than the corresponding federal forms, by requiring the pleader to allege the specific acts which constitute the defendant's negligence. This North Carolina requirement was the result of compromise between the drafting committee and practicing lawyers on the General Statutes Commission who wanted more specificity, especially in automobile cases. Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 405, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

**Form (4) Provides Sufficient Notice.** — Form (4) approves, for a complaint for negligence, a short statement of the basic occurrences and the use of the words "reckless" and "wilful" to describe the character of a defendant's conduct as sufficient notice to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

# Chapter 1B.
# Contribution.

**Article 1.**
**Uniform Contribution among**
**Tort-Feasors Act.**

Sec.
1B-1. Right to contribution.
1B-3. Enforcement.

## ARTICLE 1.

## *Uniform Contribution among Tort-Feasors Act.*

### § 1B-1. Right to contribution.

(h) The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act. (1967, c. 847, s. 1; 1975, c. 587, s. 2.)

**Editor's Note. —**
The 1975 amendment, effective July 1, 1975, added subsection (h). Section 3 of the amendatory act provides that it shall not affect pending litigation.

As the rest of the section was not changed by the amendment, only subsection (h) is set out.

**Legislative Intent. —**
It is the intent of draftsmen of uniform acts that as much as possible they be given uniform interpretation among those states where they are in force. Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

**Article Applies to Liability for Injury or Wrongful Death.** — The Uniform Contribution among Tort-Feasors Act specifically refers to liability for injury or wrongful death. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**Settlements Are Encouraged.** — The Uniform Contribution among Tort-Feasors Act contemplates that settlements are to be encouraged. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**This statute creates a new right, etc. —**
This statute provided a new right of action wholly distinct from the common-law right of indemnity. Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**It does not affect the common-law right of indemnity** arising from primary-secondary liability. Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**The rights of contribution and indemnity are mutually inconsistent;** the former assumes joint fault, the latter only derivative fault. Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**There can be no contribution, etc. —**
Where the person seeking contribution takes the position that he is free of negligence, he is not entitled to contribution. Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

Where the party from whom contribution is sought is not a tort-feasor and not jointly liable, there is no right to contribution. Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

**Primary and secondary liability between defendants, etc. —**
In accord with original. See Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**The doctrine of primary-secondary liability is based upon a contract implied in law.** Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**And is therefore subject to the three-year statute of limitations** under § 1-52(1). Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

**Effect of Release or Covenant Not to Sue. —**
The provisions of this section provide for contribution under certain circumstances, but § 1B-4 takes away this right of contribution when the provisions thereof are complied with. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Cross Action by Third Party Defendant for Contribution.** — Since this section would not require a judgment in favor of the plaintiff against third party defendant for third party defendant to be successful in its cross action for contribution or idemnity against defendant, the cross action is quite properly a part of the lawsuit. Wilson v. Bob Robinson's Auto Serv., Inc., 20 N.C. App. 47, 200 S.E.2d 393 (1973).

**Applied** in Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 198 S.E.2d 558 (1973).

**Cited** in Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562 (1972); Iowa Nat'l Mut. Ins. Co. v. Surratt, 19 N.C. App. 745, 200 S.E.2d 220 (1973); Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976).

## § 1B-3. Enforcement.

(e) The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution. Provided, however, that a consent judgment in a civil action brought on behalf of a minor, or other person under disability, for the sole purpose of obtaining court approval of a settlement between the injured minor or other person under disability and one of two or more tort-feasors, shall not be deemed to be a judgment as that term is used herein, but shall be treated as a release or covenant not to sue as those terms are used in G.S. 1B-4 unless the judgment shall specifically provide otherwise. (1973, c. 465, s. 1; 1975, c. 866, s. 5.)

**Editor's Note.** — The 1973 amendment added the third sentence of subsection (e).

The 1975 amendment added "unless the judgment shall specifically provide otherwise" at the end of the last sentence in subsection (e).

Session Laws 1973, c. 465, s. 3, provides: "This act shall become effective on and after October 1, 1973, but shall not apply to any judgment entered prior to October 1, 1973."

As the rest of the section was not changed by the amendments, only subsection (e) is set out.

**Invalid Judgment Cannot Be Satisfied.** — Where a prior judgment is invalid, there can be no effective satisfaction of it within the meaning of subsection (e). Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

**Settlement of Minor's Claim Is Not Recovery and Satisfaction.** — The settlement of a minor's tort claim which becomes effective and binding upon him only upon judicial examination and adjudication, does not constitute a recovery and satisfaction of judgment within the meaning of subsection (e). Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972).

**Applied** in Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 198 S.E.2d 558 (1973).

## § 1B-4. Release or covenant not to sue.

**This section abolishes the distinction which had existed between a release and a covenant not to sue.** Ottinger v. Chronister, 13 N.C. App. 91, 185 S.E.2d 292 (1971).

**This Section Takes Away Right of Contribution.** — The provisions of § 1B-1 provide for contribution under certain circumstances, but this section takes away this right of contribution when the provisions thereof are complied with. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Settlement between Injured Party and Tort-Feasor Is Insufficient to Show Lack of Good Faith.** — The mere showing that there has been a settlement between an injured party and a tort-feasor is insufficient to show that there has been a lack of good faith in the settlement. The burden of showing a lack of good faith is upon the party asserting it. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Claim against One Tort-Feasor Reduced by Amount of Settlement.** — Where a passenger injured in an automobile accident settled with one tort-feasor for $3,750, the other tort-feasor, who went to trial, was entitled to have judgment of $10,000 rendered against him reduced by $3,750, but he was not entitled to have judgment reduced to $3,750. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Minor May Execute Release with Court Approval.** — The infant plaintiff, having obtained the court's approval of his release agreement, is entitled to the same status as an adult executing a release under the provisions of this section. Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972).

**But Settlement of Minor's Claim Is Not Recovery and Satisfaction.** — The settlement of a minor's tort claim which becomes effective and binding upon him only upon judicial examination and adjudication, does not constitute a recovery and satisfaction of judgment within the meaning of § 1B-3, subsection (e). Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972).

**Applied** in Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969); McArver v. Pound & Moore, Inc., 17 N.C. App. 87, 193 S.E.2d 360 (1972); Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

### § 1B-6. Short title.

**Cited** in Payseur v. Rudisill, 15 N.C. App. 57, 189 S.E.2d 562 (1972).

## Article 2.

## *Judgment against Joint Obligors or Joint Tort-Feasors.*

### § 1B-7. Payment of judgment by one of several.

**Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for Other Tort-Feasor for Driver License Suspension Purposes.** — See opinion of Attorney General to Mr. Freeman, Department of Motor Vehicles, 41 N.C.A.G. 99 (1970).

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STATE OF NORTH CAROLINA
Department of Justice
Raleigh, North Carolina
*October 15, 1977*

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1977 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Rufus L. Edmisten
*Attorney General of North Carolina*

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